UNITED STATES BANKRUPTCY COURT
DISTRICT OF MARYLAND
CASE NO. 14-11952-DER
- x
In the Matter of:

FIRST MARINER BANCORP,

Debtors.
- x

U.S. Bankruptcy Court
101 West Lombard Street
Baltimore, Maryland

March 7, 2014
10:02 AM

B E F O R E :
HON. DAVID E. RICE
U.S. BANKRUPTCY JUDGE

ECRO - JOYCE YALLEY

HEARING Re (6) Motion of the Debtor for the entry of interim and final orders establishing notification and hearing procedures for transfers of certain equity securities, and granting related relief filed by First Mariner Bancorp

HEARING Re (9) Motion for authority to obtain credit under Section 364(b), Rule 4001(c) or (d) (filed under Section 364(c), NOT Section 364(b)) filed by First Mariner Bancorp

HEARING Re (15) Motion for sale of property under Section 363(b) for (I) An order (A) Approving bidding and auction procedures with respect to the sale of certain assets, (B) Approving bidding protections for the stalking horse bidder, (C) Approving procedures related to the assumption and assignment of certain executory contracts and unexpired leases, (D) Approving the form and manner of notices related to the auction and sale, and (E) Scheduling the sale hearing, and (II) An Order (A) Approving such sale free and clear of liens, claims, encumbrances and other interests and (B) Granting related relief filed by First Mariner Bancorp

HEARING Re (43) Application to employ Sandler O'Neill & Partners LP as independent financial advisors and verified statement of proposed party filed by First Mariner Bancorp

HEARING Re (76) Response on behalf of Sparrow Creek I, LLC, Sparrow Creek II, LLC, Sparrow Creek III, LLC, Sparrow Creek IV, LLC filed by Joel I. Sher

HEARING Re (99) Objection on behalf of Sparrow Creek, I, LLC, Sparrow Creek II, LLC, Sparrow Creek III, LLC, Sparrow Creek IV, LLC filed by Joel I. Sher (related document(s) 9 Motion for Authority to obtain credit under Section 364 and notice of motion filed by Debtor First Mariner Bancorp, 15 motion for sale of property under Section 363(b) and notice of motion filed by Debtor First Mariner Bancorp)

HEARING Re (100) Motion to Seal Official Committee of unsecured creditors' unredacted objection to debtor's auction procedures motion (Dkt 15) and DIP Motion (Dkt. 9) filed by Sparrow Creek I, LLC, Sparrow Creek II, LLC, Sparrow Creek III, LLC, Sparrow Creek IV, LLC

HEARING Re (104) Objection on behalf of Wilmington Trust Company filed by Jeffrey Neil Rothleder (related document(s) 9 motion for authority to obtain credit under Section 364 and notice of motion filed by Debtor First Mariner Bancorp, 15 motion for sale of property under Section 363(b) and notice of motion filed by Debtor First Mariner Bancorp, 99 Objection filed by Creditor Sparrow Creek I, LLC, Creditor Sparrow Creek II, LLC, Creditor Sparrow Creek III, LLC, Creditor Sparrow Creek IV, LLC)

HEARING Re (107) Objection on behalf of US Trustee filed by Edmund A. Goldberg Re: 9 motion for authority to obtain credit under Section 364 and notice of motion filed by Debtor First Mariner Bancorp. (Goldberg, Edmund). RE: 15 motion for sale of property under Section 363(b) for (I) an order (A) Approving bidding and auction procedures with respect to the sale of certain assets, (B) Approving bidding protections for the stalking horse bidder, (C) Approving procedures related filed by Debtor First Mariner Bancorp

HEARING Re (108) Objection on behalf of Bank of New York Mellon filed by Martin H. Schreiber II (related document(s) 9 motion for authority to obtain credit under Section 364 and notice of motion filed by Debtor First Mariner Bancorp, 15 motion for sale of property under Section 363(b) and notice of motion filed by Debtor First Mariner Bancorp, 99 objection filed by Creditor Sparrow Creek I, LLC, Creditor Sparrow Creek II, LLC, Creditor Sparrow Creek III, LLC, Creditor Sparrow Creek IV, LLC)

HEARING Re (114) Motion to seal debtor's omnibus reply in support of its motions for (I) An order approving, among other things, bidding and auction procedures with respect to the sale of certain assets and bidding protections for the stalking horse bidder filed by First Mariner Bancorp

Transcribed by: Sheila Orms, Dawn South, Melissa Looney

A P P E A R A N C E S :

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P R O C E E D I N G S

(Call to Court)

THE CLERK: On the 10 o'clock docket, calling the case of First Mariner Bancorp, Case No. 14-11952. Counsel, please identify yourselves and your clients for the record.

MR. BRODY: Good morning, Your Honor, Josh Brody from Kramer Levin Naftalis & Frankel on behalf of the Debtor, First Mariner Bancorp.

With me in the room are my colleagues, Brad O'Neill and Bob Schmidt, as well as Craig Siegel. My client's in the room, the company CEO, Mark Keidel.

THE COURT: Good morning to all of you.

MR. SELIGMAN: Good morning, Your Honor, David Seligman from Kirkland & Ellis on behalf of the committee. It's nice to be in front of Your Honor this morning.

THE COURT: Good to see you.

MR. SELIGMAN: I'm here with my colleagues Judson Brown and Jeffrey Powell on behalf of the committee.

THE COURT: Thank you.

MR. GOLDBERG: Good morning, Your Honor, Edmund Goldberg for the U.S. Trustee.

THE COURT: Good morning. We have some others in the back.

MR. YUMKAS: Good morning, Your Honor, Lawrence Yumkas, local counsel to the debtor.

THE COURT: Good morning to you.

MR. ROTHLEDER: Good morning, Your Honor, Jeffrey Rothleder, Arent Fox on behalf of Wilmington Trust as trustee.

THE COURT: Good morning.

MR. PITTA: Good morning, Your Honor, Thomas Pitta of Emmet Marvin & Martin on behalf of Bank of New York Mellon as trustee.

THE COURT: Good morning.

MR. WASSERMAN: Good morning, Your Honor, Richard Wasserman and Michael Schiffer on behalf of RKJS Bank.

THE COURT: Good morning to you.

We're here today for a hearing in this case. There are a number of items on the docket, according to my count, we have without counting all of the responses, we have six items before the Court, the application to employ Sandler O'Neill, the equity securities trading notice motion, the motion for approval of debtor in possession, financing, what is perhaps I guess the main event, the bidding procedures, and two motions to file pleadings under seal.

Mr. Brody, I suppose what I would like to do is hear from you and the other parties who have entered an appearance or wish to be heard what the status of the -- these matters is, what remains in dispute, and how you would

propose we proceed today.

MR. BRODY: Certainly, Your Honor. I think my high level, the trading motion, which is unopposed, I think I would propose we take that first. The next I would go to the Sandler O'Neill application which my understanding from discussions with Mr. Seligman is they're not -- the committee is not opposing the application. They want to make a statement on the record with respect to their -- so again, it's not opposed.

I think I would next move to the sealing motions, because those kind of set the tenor for, you know, who's going to be in the courtroom and what's going to be discussed on the DIP and on the bid procedures.

And those two motions, Your Honor, I'm happy to tell the Judge -- tell Your Honor that after a lot of work, we've managed to settle the committee's objections to the DIP, which I will walk Your Honor through the changes we're making.

As Your Honor hopefully as seen, we filed last night amended bidding procedures which do not address all of the committee's issues, and I think there are a couple of, you know, I'll call high level issues that are still -- Your Honor needs to decide on. But for the most part, I think a lot of the smaller issues have been, if not resolved completely, at least we've gotten as far as we can trying to

limit the issues that need to be heard.

THE COURT: All right.

MR. BRODY: I guess from the outset, Your Honor, I'd also note, I know Mr. Yumkas I believe may have called Your Honor's chambers earlier. I have a hard stop today around 5 o'clock, and I appreciate Your Honor giving us the time today, and our goal is to get through everything today as best as we can.

THE COURT: Good, okay.

MR. BRODY: So I guess starting, Your Honor, with the trading motion, essentially, Your Honor, I would in large part rely on everything that was entered into the record, and the arguments that were made at the interim hearing. No objections have been filed. There was one notice of substantial shareholder that was filed by Mr. Hale (ph), which is pretty much what we expected.

The only other comment that we go, we received a call from the Securities and Exchange Commission asking that we file the notice as part of a Form 8K which we -- I had forgotten we did that for the interim order and we'll do it again for the final order. But other than that, Your Honor, there have been no even informal objections or calls that we've received on that motion.

So I guess I would, relying on the interim hearing, would ask Your Honor to enter the final order.

THE COURT: I see. All right. Thank you.

Is there anyone present in court today who wishes to be heard one way or the other on the motion with respect to equity securities trading?

(No response)

THE COURT: Let the record reflect there's no response.

Very well. I'm satisfied from the evidence that was -- and arguments made at the prior hearing as well as counsel has indicated there being no further objections to the entry of a final order on the trading of equity securities or notification with respect to the trading of equity securities. I'm going to grant on a final basis that motion.

MR. BRODY: Thank you, Your Honor.

The next item I'd like to address it the debtor's retention, application to retain Sandler O'Neill. I guess at this point, I'll -- you know, we don't -- I don't have anything further to add other than what's in the application, and I would turn it over to Mr. Seligman for any comments he wants to make.

THE COURT: Very well, thank you. Mr. Seligman.

MR. SELIGMAN: Your Honor, again, David Seligman for the record.

Your Honor, we had initially filed a response with

respect to Sandler O'Neill application --

THE COURT: Right.

MR. SELIGMAN: -- because we wanted to take some time to discuss the issue with the committee and consider it further.

After further consideration, we are not objecting to the retention. I think the issues that we had raised with respect to the dual engagement by Sandler O'Neill at the debtor level as well as the bank, are issues that will probably be discussed in the context of the bidding procedures and any issues of that sort, and we'll take it up in argument, but as far as the -- that goes to the question of bidding procedures and the propriety of the bidding procedures from our perspective. But at least in terms of the application to employ Sandler O'Neill, we don't have any objection to that engagement.

THE COURT: All right. Thank you. Is there anyone else in court who wishes to be heard on the engagement of the Sandler O'Neill firm?

(No response)

THE COURT: Let the record reflect there's no response. I've reviewed the application and I've considered what's been said, I'm going to grant the application.

MR. BRODY: Thank you, Your Honor.

With that I think before I turn to the main event,

I think it makes sense at this point to turn it over to Mr. Yumkas to deal with the two sealing motions.

THE COURT: All right.

MR. BRODY: Or actually, I mean, Your Honor, there are actually two sealing motions because --

THE COURT: Yes.

MR. BRODY: -- one is ours and one -- I think that, you know, to tell Your Honor, the committee and the debtor are both in the same position as far as the need for both those motions be granted. So I don't know, I think Mr. Yumkas will handle it.

MR. YUMKAS: Thank you, Your Honor, Lawrence Yumkas on behalf of the debtor.

Your Honor, the debtor has filed a request to -- for permission to file a redacted copy of the reply to the objections. The various objections made to the bid procedures, that motion, were a principal topic of discussion today is going to be about sensitive financial information related to the bank. The parties are pretty much in agreement that it's in everyone's interests not to publish information about that subject publicly today in order to preserve the maximum value of the debtor's assets.

The debtor's assets are its interest in the bank, it's in everyone's interest to maintain the highest value of the bank. And on -- that requires, at this moment in time,

at least from the perspective of the parties that we keep certain financial information confidential and limited to the parties who have signed confidentiality agreements and not to anyone else.

And in addition to seeking permission about filing -- if -- on the record of the case is a redacted version, we would also be seeking permission to limit whoever's in this courtroom today to the same group of people who have signed non-disclosure agreements.

THE COURT: So what affect is that going to have on the folks gathered behind you?

MR. YUMKAS: We would ask the Court to direct people who have not signed, I think a confidentiality agreement, to leave during the rest of these proceedings.

THE COURT: All right. I understand your position. Does the committee have anything to add to that?

MR. SELIGMAN: Your Honor, while we maybe don't share the exact level of heightened sensitivity to the information as the debtors do, we don't have any problem with their request to seal because in an abundance of caution, we want to just make sure that there's no information that could potentially be problematic. Although we have done -- I've been counsel to several committees where case -- where bid procedures have been done completely in open court, but we understand the debtor's position, and

so we don't have any objection to that.

I would -- you know, and we're fine if Your Honor wants to clear the courtroom for the entire scope of the proceedings. We're happy, Your Honor, if there were portions that were -- of the hearings that could be done where there was -- where there could be an open court, where there'd be no confidential information. That may be a little unworkable because of the way it's going to be -- it would be herky jerky to split it up.

So probably in an abundance of caution, we are fine with the procedure as suggested by the debtors.

THE COURT: I see, all right. I see some standing up. Mr. Goldberg, do you wish to be heard?

MR. GOLDBERG: Your Honor, I'm generally okay with the concept that the parties who are negotiating the terms of this position of the assets in this case wish to maximize its value by limiting exposure of certain sensitive information, that's understandable and appropriate.

What I don't want the Court to do is to enter an order that would preclude anyone from seeking reconsideration of it for cause. If someone believes that the public interest requires disclosure or some other interest requires disclosure, that -- this order ought not bar such a motion for being considered.

So I'm generally okay with it. I think it's

measured. I think it's understandable. We have to look at those things with an eye that recalling this is a public court, this is a public proceeding, bankruptcy requires transparency, and with those caveats, I think that as long as no one will be precluded from asking formally for the Court to reconsider this order, then we're fine with it.

MR. PITTA: Your Honor, Thomas Pitta, Emmet Marvin on behalf of Bank of New York Mellon.

Your Honor, we filed and joined the committee's objection, we are an interested party here. I think that the relief that's being sought here is kind of overbroad. We're talking about a -- you know, a motion to establish bidding procedures, and we're going to exclude all the parties who have not signed confidentiality agreements, which we haven't been offered one, Your Honor, but --

THE COURT: So your client hasn't signed the confidentiality agreement at this point?

MR. PITTA: We have not.

THE COURT: All right.

MR. PITTA: You know, I would be prepared to agree not to disclose any of the confidential information, the sensitive information that's being discussed here. But I think that it would be overbroad for us to be excluded from an entire DIP and bid procedures hearing based on the fact that there may be some financial information discussed as

part of that hearing.

THE COURT: All right. I understand.

MR. ROTHLEDER: Good morning, Your Honor, Jeffrey Rothleder from Arent Fox on behalf of Wilmington Trust, the trustee. We're in the same position as Bank of New York. I would also be willing to agree not to disclose any financial information, but we also have not been offered the opportunity to sign a confidentiality or should we be excluded.

THE COURT: All right. Thank you. Mr. Yumkas?

MR. YUMKAS: Your Honor, just a follow-up as to Mr. Seligman's suggestion that we bring people in and out is just impractical.

THE COURT: Well, I think he was suggesting that that was impractical.

MR. YUMKAS: Okay. It is.

THE COURT: Not that he was suggesting that that's what should be done.

MR. YUMKAS: Also technically, the U.S. Trustee's Office has not signed a confidentiality agreement, but we have no objection to their continuing presence, and similarly counsel to the board of the debtor and First Mariner Bank has -- we don't believe has signed one, but we have no objection to their presence today either.

And as far the parties who just agreed to be

bound, as long as the Court's order binds them to that confidentiality, we're fine with them staying as well.

THE COURT: Well, before coming to court today I read your motions to seal and the papers that were filed that are the subject of the motions to seal in their redacted form and frankly I thought they made a pretty persuasive case for the various positions that the parties are advocating, without consideration of the redacted information.

I then thought about what was being asked, and I decided to look at the unredacted versions of these documents that the Court had been provided because the redacted information is, as I understand what the parties are saying, it relates to facts on which the parties want the Court to base its ruling. It's not like a situation where you're trying to exclude social security numbers, private information, some sort of technical commercial information that would give an advantage to somebody about some particular aspect of the debtor's business, but is really collateral to the ultimate decision.

And so I looked at the unredacted versions of these documents. And with one or two exceptions, couldn't understand why the parties had redacted what was redacted. So looking at this from the perspective of the cases to which I was referred, where the Court -- where there's a

presumption of open proceedings, where the Court is supposed to take a skeptical look, yes, under Section 107 if it's confidential commercial information the Court should, must enter an order to protect that, I wasn't particularly persuaded from what I have in front of me that the information that you wish to submit under seal really meets the test.

And I'm a little alarmed frankly at the idea that we're going to have a secret proceeding in a pretty significant case, even taking into account that it's a public company, even taking into account that the most significant asset is a bank. And so I found myself in a troubled position. I don't really understand why the requested information is to be sealed and my take on it was, and I'm not sure that this really addresses the parties' concerns, but my take on it was to say, well, these motions ask the Court to accept the redacted pleadings as filed. And that's all they really ask.

And so my inclination, I'll hear you on whatever you wish me to hear or do to make a ruling on this, but my inclination was to say, okay, fine, we'll accept the redacted pleadings pursuant to your motion, but to -- and treat them as your respective pleadings.

To the extent that you wish the Court to rely upon any of the redacted information as a basis for a ruling

today, we'll take that up when you propose to submit it to the Court. Because it's not clear to me which, if any, of these objections really remains, and it's not clear to me which, if any, of this information is really necessary for the Court to make a decision.

And I'm concerned about the appearance of bankruptcy proceedings being conducted in secret. This is not the Soviet Union. Bankruptcy is the opposite of that. It's supposed to be fully transparent.

So those are the concerns I'm grappling with, and I'd be happy to hear from you on what might address them.

I'll tell you what, I'll take a five minute recess while you discuss how you might want to proceed in light of what I've said.

THE CLERK: All rise. Court is in recess.

(Recessed at 10:21 a.m.; reconvened at 10:28 a.m.)

(Call to Court)

THE COURT: Mr. Yumkas.

MR. YUMKAS: Thank you, Your Honor.

Your Honor, the parties are mindful of the tension between the need for this to be a public proceeding and the need not to convey, whether intentional or not, anything that would undermine the value of the assets.

We've spoken with the committee and what we're proposing to the Court is the following procedure. If the

Court would consider today's proceedings to be provisionally sealed, the parties can then look at the transcript as soon as we can get them printed and read, and then jointly provide to the Court the report of any information that they would want the Court to consider permanently kept redacted.

THE COURT: Okay. What does that mean for the assembled public here?

MR. YUMKAS: And as to the assembled public here, the parties are okay with keeping in the courtroom all parties in interest, to the extent the parties in interest have not agreed yet to be bound by the confidentiality, we would ask that they agree to that on the record, or be asked to leave.

And other than those parties --

THE COURT: Mr. Yumkas, I'm not going to have a sealed courtroom.

MR. YUMKAS: Okay.

THE COURT: And I'm not persuaded that much of this information is really that confidential or is even needed in order for one side or the other to prevail in its arguments. And I'm, as I said before, inclined to let you proceed, and then when you get to a point where you want to actually rely on something you think needs to be sealed, we'll deal with that at that time.

But I'm not going to go through taking roll of

who's in the courtroom, interview all of them, figure out whether they have an interest, whether they're willing to be bound, no. And I'm just not comfortable with --

MR. YUMKAS: Very well, Your Honor.

THE COURT: -- doing that. And I'm not persuaded that the cases that are cited to me say that. And they do say the Court's supposed to take the least restrictive alternative.

So, for example, there's a document attached to your omnibus response as Exhibit C or something like that which wasn't uploaded in the public file, what relevance this has I don't know, but an approach might be to offer it as an exhibit under seal, and not otherwise discuss it or just point the Court to it or some particular provision of it so the Court can take whatever fact you're eluding to into account. It speaks for itself, for example.

I'm just -- I'm not comfortable that a bankruptcy court should be in the business of conducting secret proceedings, and I don't want to proceed that way. We'll spend all day litigating who out there is entitled to be here for what.

MR. YUMKAS: Very well, Your Honor, we'll make it work.

THE COURT: All right.

MR. YUMKAS: Thank you.

THE COURT: Thank you.

So let me make clear for the record, I'm permitting the filing of the two redacted pleadings, but I'm not making a determination as to confidential commercial business information as to anything until such time as it's submitted to the Court as evidence.

MR. YUMKAS: Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. BRODY: Again for the record, Josh Brody from Kramer and Levin on behalf of the debtor.

So, Your Honor, at this point, I think what I would like to do is the following. You know, the last couple of days there's been a lot of activity and trying to have discussions with both the committee and with the stalking horse bidder, while trying to narrow the issues that Your Honor needs to decide today.

And we think we have been successful, as I mentioned, on the DIP credit agreements, and I'm going to walk Your Honor through those changes. I don't have yet for Your Honor a red line of the DIP credit agreement and the DIP order, because these changes were literally agreed to, finalized this morning. But I will walk Your Honor through what they are.

They're not -- with respect to the DIP at least, the changes are really not that significant. The majority

of the changes that were more substantive I think relate to the bidding procedures, and the red line that we filed yesterday.

THE COURT: So is it the case, because that was my impression from what you said at the top, right, that the objections to the debtor in possession financing motion have been resolved by these changes?

MR. BRODY: Yes, correct, Your Honor.

THE COURT: So there shouldn't be any need for any confidential information to persuade the Court that an unobjected to financing motion --

MR. BRODY: No.

THE COURT: -- should be approved as long as I can review the actual terms.

MR. BRODY: Your Honor, that's totally fair. And frankly, you're correct and maybe this is more a sequencing issue than in terms of addressing the sealing motion then --

THE COURT: That's fine. So tell me about the financing terms that have been agreed to.

MR. BRODY: So the changes that were made, Your Honor, I think there are two what I would say most significant ones that really went to the issue that the committee objected to. I think if Your Honor will recall from the pleadings, one of the big concerns the committee had was the presence of the DIP and any DIP draws prior to

the bid deadline how a bidder was going to address, you know, make sure they have their deposit correct, and they were putting the correct amount of money --

THE COURT: Yes.

MR. BRODY: -- up. So we've essentially agreed to with the committee, is that we will not make any draw to the DIP facility until the sale hearing absent their consent.

So this way, all parties are paying attention, it's a little bit of -- doing that way with the committee consenting, it enables us if it becomes clear that there's no problem with draws, in terms of its impact on the bid procedures that we can make those draws, but essentially this way, the committee feels that it may negatively impact the bid process, there won't be any draws.

As a related point, the stalking horse bidder/DIP lender has agreed that if there are no draws made, they will not charge any fees on the DIP. So essentially, if come to the sale hearing, they're not the winning bidder, and there's somebody else needs to come in and is going to replace them, they won't be owed anything on the DIP, assuming there had been no draws. Which I think was a fairly significant concession on their part.

The other changes that were made, and this is to just the objection the committee raised about there being a lack of a professional fee carve-out in the DIP is that

essentially the stalking horse has agreed, and I think frankly this may have always been the case, just would require a little bit of clarification, that once the DIP has been -- as the DIP has been approved, then the committee has either consented to a draw presale hearing or after the sale hearing, that the debtor can draw on the entire amount of the DIP and set it aside in a separate bank account, whether it's to fund advance retainers to estate professionals, or put in accounts it's away from the DIP lender's lien, functionally accomplishes the same thing. Which it preserves the value of the DIP to pay professional fees the same way a carve-out would.

The other changes, and I will try to make sure I hit all of them, I think I would say, you know, more clarifying in nature, and they're not what I would think -- I don't think of them as major substantive issues, but they relate to modifying and clarifying the -- the DIP lender would have to give five business days' notice before they exercise any remedies other than I believe there was charging default interest, or sending other types of -- or sending default notices or refusing to make any additional draws.

Clarify that, you know, that if there are any asset sales, that the proceeds will be used to pay down the loan, but only up to the amount of the DIP loan, just to

make that clear that obviously no payments will be made in excess of the DIP loan, making it clear that the proceeds are going to be limited to U.S. Trustee fees and professional fees, which is again always the intent, just clarifying it.

I'm sure Mr. Seligman can correct me if I'm missing anything, but I think for the most part, that really covers the changes to the DIP that resolved the committee and the U.S. Trustee's objection.

THE COURT: All right. Thank you. Mr. Seligman, does that address the committee's concerns?

MR. SELIGMAN: It does, Your Honor. There's -- I would just like to state that our principal objection, obviously to the DIP was while we had no objection to a DIP in concept, our concern was that we felt that this DIP was infecting the bidding process and making it more difficult for there to be bids. And that was our main function or objection to try and police that.

And I think that the changes that Mr. Brody has outlined resolve it for us. There's probably a couple of other nits and nats, just clarifications in the document. I think there was one other one, Your Honor, oh, that was also important to us, which was the original bidding procedures required basically a replacement DIP.

Again, we thought that that was not appropriate in

the context of a bidder. They should be focused on bidding for the assets, rather than necessarily having to do a replacement DIP. So another modification to the procedures was that a bidder could -- as part of the bid proposed or replacement DIP or provide other satisfactory evidence or information to the debtor to show that administrative fees could be covered if they were the successful bidder and that the stalking horse DIP was not available.

So with that and a couple of other minor clarifications, that resolved it for us. From our perspective now it's pretty much a clean DIP, and allows people to make bids or not make bids without consideration of the more complex DIP issues.

THE COURT: All right. I see, thank you.

Mr. Goldberg, I believe you were objecting or the United States Trustee was objecting to this financing.

MR. GOLDBERG: Your Honor, the U.S. Trustee is satisfied that the committee's satisfied, that's the main concern. We think that there have been actual negotiations with give and take by the negotiating parties. We think that that's sufficient to satisfy our concerns.

THE COURT: All right. Does anyone else wish to be heard on the debtor in possession financing motion?

(No response)

THE COURT: No one has responded. Anything

further, Mr. Brody?

MR. BRODY: Not on the DIP, Your Honor.

THE COURT: All right. When do you think you would have the actual agreement and order to the Court?

MR. BRODY: If not today, it'll be shortly thereafter.

THE COURT: Okay. You'll submit red line versions?

MR. BRODY: Correct, Your Honor.

THE COURT: Okay. I'm satisfied based upon what's been said today on the record and my prior review of the materials filed in support of the motion and considered at an earlier hearing that this is an appropriate debtor in possession financing arrangement, as modified on the record here today.

I will obviously review the agreement and the order when they are submitted in chambers, to make sure they're consistent with what's been said. But if they are, it will be approved.

MR. BRODY: Thank you, Your Honor.

I guess that would -- I would turn to the bidding procedures themselves, and before we get into the actual hearing, and which I'll get to in a second as to how I'd like to proceed, I'd like to walk Your Honor through the changes that were submitted yesterday evening to the bidding

procedures.

And I think the way I would characterize these changes, Your Honor, is as I mentioned at the outset, I don't think or I know that we have not settled all of the committee's issues. We really did our best to use the committee's objections, which were provided to us in advance of their actual filing their pleadings, because there's been a fair amount of give and take over the last number of weeks to try and see if we could not reach a full agreement, at least narrow the issues.

I think we've done a fairly good job of trying to narrow those issues. I know that, and probably just to make this simpler, I'm not going to tell -- going to take the -- tell Your Honor that whatever any particular change specifically addresses or resolves an issue waived by the committee, because that'll just cause too much back and forth and cause Mr. Seligman to have to jump up here every five minutes.

So instead I think I may walk Your Honor through the changes, and then through the course of the hearing, I think it'll be clear to Your Honor what issues really have been, you know, if not resolved completely, but at least somewhat addressed. And, you know, I think that from my perspective, and I know that I'd mentioned this to Your Honor at the first day hearing when we were talking about,

you know, date -- deadlines and dates for filing objections, that we wanted to have as much time as possible to try to reach a resolution.

And I certainly would say that, you know, from the debtor's perspective, the committee and the stalking horse, I think there has been, you know, a fair amount of movement. I'd like to -- at the risk of sounding like I'm tooting my own horn, I think that, you know, we used the opportunity of the committee's objection to try to extract changes from the stalking horse.

And, you know, Your Honor will obviously decide whether or not they were meaningful enough, but I think it was -- a fair amount of effort was put into it and we were somewhat successful.

So I guess --

THE COURT: Well, let me just say a couple of things. First of all, I assume you're referring me to this updated version that was filed last night at Docket No. 118?

MR. BRODY: Correct, Your Honor.

THE COURT: Okay. And what I'd like to do before you start, you can make your presentation as you suggested, but I think I'd like to hear from Mr. Seligman and anyone else who's objecting to the bidding procedures as revised, what the objections are, so before we go into the hearing and I understand what's in dispute.

MR. BRODY: Your Honor, that's certainly fine, makes a lot of sense. I guess the one thing I would say is, you know, in part because we want to make sure we get finished today, and you know, I discussed with Mr. Seligman sort of the hearing procedure, and we had both sort of been in agreement that we're not going to make any opening statements, we're just going to go straight to the evidentiary record. Go through all the evidence and the witnesses, close the record, and then closing arguments to try to streamline it.

And I guess obviously Your Honor will hear from Mr. Seligman now as to which issues are still open but --

THE COURT: I want to know what we're having a hearing about.

MR. BRODY: No, fair enough.

THE COURT: I'm not trying to get lengthy opening statements or upset your agreement amongst counsel which sounds fine to me on how to proceed. I just want to understand what I'm supposed to decide.

MR. BRODY: No, understood.

THE COURT: So tell me -- oh, I thought you were going to go through the bidding procedures.

MR. BRODY: Oh, I guess, Your Honor -- I wasn't sure if Your Honor wanted me to walk through them or hear first from Mr. Seligman as to what he thinks are still

issues he has objections to.

THE COURT: Maybe it's easier just to hear what the objections are and then let you put on your case --

MR. BRODY: That's fine with me.

THE COURT: -- to try to overcome those.

MR. SELIGMAN: Your Honor, that was going to be my suggestions too, rather than taking up the time of the Court to walk through the changes that were made, and focus on what --

THE COURT: Fine.

MR. SELIGMAN: -- is at issue.

Essentially, Your Honor, there -- and I'm not going to argue, I just want to lay out the issues. Essentially I think that there's three categories of objections that remain. The first one is the timeline. There's the proposed date for a bid deadline of April 6th. We have issues with proposed target closing dates in the APA, the merger agreement of April 30th. So I'll put that one in category, timeline.

Second category is the more economic terms of the bidding procedures, break-up fee, expense reimbursements. Those are essentially it. I think that there has been a proposal in terms of a reduction in bid increments from 250 to 150, while we don't love it, we're willing to live with that.

So I think it's principally the economics of the break-up, and how you calculate it, and what's the right market, and numerations and nominators.

Third point is there's a capitalization requirement. The stalking horse is obviously putting in capital. There's a requirement that the level of capital that the stalking horse is putting in has to be essentially matched, without getting into too much details right now, and that's an issue that we have.

So I think that those are principally the three categories of --

THE COURT: When you say capitalization, we're talking about the amount of money that the successful purchaser will put into the bank to capitalize the bank, correct?

MR. SELIGMAN: For going forward, right.

THE COURT: So the question is whether a competing bidder should necessarily have to capitalize it exactly the same way.

MR. SELIGMAN: Exactly the same way.

THE COURT: Okay.

MR. SELIGMAN: Yeah.

THE COURT: All right. I understand. That's helpful, thank you.

MR. BRODY: Your Honor, certainly I'm happy to

hear that that's the only issues that are still open.

I guess at this point, Your Honor, because again without getting the specifics of the changes that were made, unless if Your Honor wants me to, I'm happy to do so, but --

THE COURT: No, let's focus on, we a limited amount of time, let's focus on how to resolve these three.

MR. BRODY: With that, Your Honor, I'm going to turn the podium over to my partner, Mr. O'Neill, who's going to be handling the evidentiary portion of the hearing.

THE COURT: All right. That's fine. Mr. O'Neill.

MR. O'NEILL: Good morning, Your Honor.

THE COURT: Good morning.

MR. O'NEILL: The debtor calls William Boyan.

THE COURT: Sir, would you come forward.

MR. O'NEILL: Your Honor, may I approach with an exhibit binder?

THE COURT: You may, I think --

MR. O'NEILL: I believe Your Honor has -- oh, there is one, Your Honor.

THE COURT: Okay. Sir, if you would stand in front of the witness box, raise your right and take the oath before you are seated, that would help.

WILLIAM LESTER BOYAN, III, WITNESS, SWORN

THE CLERK: Please be seated. Please state and spell your full name and give your address for the record,

please?

THE WITNESS: William Lester Boyan, III, B as in boy, O-y-a-n. Address, 8400 Comanche Court, Bethesda, Maryland 20817.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. O'NEILL:

Q Where do you work, Mr. Boyan?

A Sandler O'Neill & Partners.

Q What is Sandler O'Neill?

A It's an investment banking firm.

Q What focus, if any, does Sandler O'Neill's practice have?

A We focus on financial services and specifically about 85 percent of our business focuses on banking work.

Q How many bank deals does Sandler O'Neill close annually approximately?

A From an M&A perspective, we close anywhere from 20 to 50 transactions a year. Since 2005, we have completed 367 transactions for 113 billion in deal value.

Q And where does Sandler O'Neill typically fall in the deal ranking tables?

A When we look at the transactions where we have been an advisory on a buy side or sell side transaction versus our competition, we annually rank as number one or number two in

terms of number deals completed annually.
Q Broadly speaking, what services does Sandler O'Neill provide to its clients?
A We're a full service investment banking firm. From an investment banking perspective, we provide M&A advice, we raise capital for banks, and provide other strategic advice.
Q What is your position at Sandler O'Neill?
A I'm a managing director in the investment banking group.
Q How long have you worked there?
A Ten years.
Q Where did you work before you were at Sandler O'Neill?
A I was with Friedman Billings Ramsey, which is also an investment banking firm, headquartered in Arlington, Virginia.
Q What did you do there?
A I was a managing director in the investment banking group focused on banks and thrifts.
Q And how long did you work there?
A Seven years.
Q Before that, where did you work?
A I was with Hubde Financial (ph), which is an M&A firm that focuses on banks, and I was with them for five years.
Q Okay. Do you have any degrees?
A I graduated from Georgetown University and their

business school, graduated in 1988.
Q What kind of work do you do at Sandler O'Neill?
A I am an investment banker, so I call on banks particularly in Maryland, D.C., Virginia, and also other parts of the country, and I work with banks to help them with capital raising, M&A advisory services, and other strategic advice.
Q For how long have you been advising banks on M&A and other transactions?
A For 25 years.
Q Approximately how many bank clients have you advised over the course of your 25-year career?
A Numerous, successful M&A transactions, probably completed somewhere between 35 and 60 M&A transactions --
Q How about branch --
A -- as a lead, that would include branch transactions. Branch transactions, probably about 25 branch transactions.
Q And when you say you completed M&A transactions, are those transactions on the sell side?
A Both sell side and buy side M&A transactions.
Q And approximately how many buy side clients have you advised during the course of your career?
A I'd say probably 25 percent of the time I'm on the buy side, probably 75 percent on the sell side.
Q Just by way of example, what bank and thrift M&A

transactions have you led in the past year or so?
A I represented Annapolis Bancorp in their sale to FNB Corporation. That closed April 2012 I believe. I represented Virginia Commerce in Arlington in their sale to United Bancshares, that closed January 31st of this year. I closed the sale of United Financial Banking Company, headquartered in Vienna, Virginia to Cardinal Financial. That closed in January 15th of this year.

I announced the sale of Prince George's Federal Savings Bank in Upper Marlboro to Southern National Bancorp of Virginia. That was announced just recently, and last week announced the sale of People's Service Company in Nixon, Missouri to Southern Missouri Bancorp. So that's just the M&A transactions.
Q I notice that a lot of those banks are from in and around this area. Do you specialize in any particular region?
A I -- as I mentioned earlier, I live in Bethesda, so I spend a lot of time with banks and thrifts in D.C., Maryland, and Virginia.
Q Just by way of example, could you describe what you did in the Virginia Commerce transaction?
A I developed a long term relationship with Virginia Commerce. I had a relationship with Virginia Commerce going back to the mid-'90s, helped them raise capital along the

way. They had some trouble with credit quality, sustained some significant losses. So ultimately, ended up selling that institution where we advised the board on what their opportunities might be if they decided to sell the company.

Conducted due diligence on the institution to make sure we understood the status of the balance sheet and income statement, and the viability of the franchise, attractiveness of the franchise.

We put together what we call a confidential information memorandum that describes the entire company from, you know, all aspects of the company management team, operations and otherwise. We then established a list of potential buyers that we would consider once we went out to market the company.

Of course, keeping the board and management team apprised and involved in the process all along the way, and ultimately marketed that company to a number of banks that operate within the greater region. And ultimately, we sold that company to United Bancshares, they were the high bidder. Took the United Bancshares through their full due diligence, and then we helped the company conduct -- helped Virginia Commerce conduct due diligence on United Bancshares, to make sure the stock that we were receiving had the prescribed value that we thought it did.

And then helped negotiate the definitive agreement

between the parties with legal counsel, and then we announced the transaction, and then closed January 31st of 2014.

Q That was a sell side deal, what sorts of things do you do when you represent a potential purchaser of a bank?

A We tend to help board and management understand the opportunity and the risks involved with any particular transaction. We conduct -- formulate a bid, typically. Typically, you'll receive a confidential information memorandum with the bidding procedures and instructions involved, and we help develop a bid that complies with those bidding procedures, and submit the offer on behalf of the institution.

If selected to go to the next round, which is due diligence, we assist the company in evaluating the company in conducting due diligence. And then often times, you might have a rebid, we'll formulate that bid, and advise the board prior to doing so.

And if successful, then we would help them negotiate the definitive agreement and close the transaction.

Q As a banker at Sandler O'Neill, have you run auctions in which bank assets have been sold?

A Frequently, yes.

Q How many times roughly?

A Well, at least in all the transactions that I

mentioned, plus all the ones that weren't successful, so the -- you know, more than 50.

Q Have you organized and managed due diligence on bank assets, as part of M&A processes in the past?

A Yes, numerous times.

Q How many times?

A A lot more than 50.

Q Have you conducted due diligence and formulated bids for bank assets on behalf of buy side clients in the past?

A Yes.

Q How many times?

A Numerous times, I couldn't begin to count.

Q What involvement, if any, has Sandler O'Neill had in bank holding company bankruptcy cases?

A This would be my first.

Q What about Sandler O'Neill?

A Sandler O'Neill has been involved with a number of -- there have only been a handful of -- I'd say less than ten bankruptcy transactions involving banks. The first one came in the end of 2010 and Sandler O'Neill was involved in that transaction, American West. And then there was another transaction, Premiere in Florida, which we were also involved.

Q And you said this is your first bank holding company bankruptcy. Do you feel qualified to run an auction in

bankruptcy even though you never have before?
A Yes. The process is ultimately identical to what we would conduct when we're selling an institution outside of bankruptcy.
Q Have you ever had occasion to negotiate or consider Section 363 auction procedures in the past?
A I have not specifically in a 363 transaction, no.
Q Do you believe your experience allows you to do that in this case?
A Yes.
Q Why do you say that?
A As I mentioned, I think that the auction procedures as have been drawn-up by the lawyers in this case and negotiated to some degree are not dissimilar from the process that we would go by in a normal M&A transaction outside of bankruptcy.
Q Do you ever have occasion to give speeches at professional conferences?
A Frequently, yes.
Q On what topics, generally?
A Usually relating to mergers and acquisitions, capital raisings, strategic issues. Often times, talking about an overview of what's happening in the banking industry, give you know, either directors or accountants or lawyers or bank management an idea of what Sandler O'Neill's view of what's

happening in the banking industry at any given time.
Q What are some of the organizations that which you have spoken regularly?
A Annually, I -- for -- at least for the last let's say ten years, I always do an hour long speech at the Maryland Banker's Convention. That is held typically in May or June of each year.
MR. O'NEILL: Your Honor, we would offer Mr. Boyan as an expert on bank mergers and acquisitions.
THE COURT: Is there any objection to the qualification of this witness as an expert?
MR. BROWN: On bank mergers and acquisitions, on that topic alone, Your Honor, there is no objection.
THE COURT: All right. He's admitted as an expert to testify on that subject.
BY MR. O'NEILL:
Q Mr. Boyan, what role has Sandler O'Neill had in these cases?
A In the First Mariner case?
Q Yes.
A We have acted as --
Q This case, excuse me.
A -- investment banker since November of 2009.
Q Broadly speaking, what has Sandler O'Neill done for First Mariner?

A Our initial task was to help the company develop a capital plan to file with the regulatory authorities. That would be the primary regulators, the FDIC, the State of Maryland, and the Federal Reserve to help the company comply with minimum capital requirements in certain regulatory orders that have been filed at First Mariner Bank and First Mariner Bancorp.

Q What role have you had personally in this matter?

A I have been one of the two parties that have led the team for Sandler O'Neill since that time.

Q And what have you Sandler O'Neill done during the past four years to familiarize yourself with the First Mariner's finances and operations?

A You know, we're very -- we are -- gone through their financials, conducted our own due diligence, so we are very aware of all the aspects of the institution.

Q Do you have an understanding of why Sandler O'Neill was hired in 2009?

A The company received a cease and desist order from the FDIC in the State of Maryland. Among other things, they were required to raise capital to get to 7 and a half percent tier one leverage ratio, and a 11 percent total risk base ratio.

The Fed also had a written agreement that required them to be at a 4 percent tier one leverage ratio, and an 8

percent total risk base ratio, but that was at the bank holding company level.

Q You mentioned the FDIC and the State of Maryland and the Federal Reserve, what relationship did they have to First Mariner?

A Will you repeat the question, please?

Q I said, you mentioned the FDIC, and the State of Maryland, and the Federal Reserve, what relationship did they have to First Mariner?

A The FDIC and the State of Maryland are their primary regulators.

Q When it was hired, broadly speaking, what did First Mariner ask Sandler O'Neill to do?

A Well, as I mentioned, the first thing we did is help develop a capital plan as to what the alternatives would be, so that we, you know, presented that to the board, worked with management on that plan, and then submitted that to the appropriate regulatory authorities.

Q And broadly speaking, without getting into great detail, over the last four years, what types of transaction -- transactions has Sandler O'Neill pursued on behalf of First Mariner to meet its regulatory obligations?

A We have pursued numerous transactions, and we tried to sell the company, the holding company and the bank to strategic buyers numerous times. We tried to raise capital

numerous times, so there's a series of transactions that we attempted throughout the years.

Q Did Sandler O'Neill and First Mariner in any way attempt to limit the types of transactions it was willing to consider to achieve its regulatory goals?

A No. We never -- when we went out to talk to people, always trying to achieve the highest possible value for the stakeholders in the company, specifically the common -- the stockholders, but as well as the trust preferred holders.

Q And broadly speaking, what type of investors did Sandler O'Neill market transactions to?

A Specifically financial investors or strategic buyers.

Q What are strategic buyers?

A Other banks or bank holding companies that we deemed would have interest in the -- in this company.

Q And what is a financial investor?

A A financial investor would be either a private equity investor or a hedge fund or other such fund that has interest in investing in banks, that doesn't operate a bank itself.

Q How did you identify candidates to market transactions to, Mr. Boyan?

A For strategic buyers, as I mentioned, we complete numerous M&A transactions annually in the banking business, so we have a very good feel for who the buyers are in any

given market, and you know, we have about 350 people in our company, and we spend a lot of time talking with all the banks in the U.S. and abroad to understand what their desires are if they want to buy banks in the U.S.

Q Do you have an understanding -- oh, strike that.

How sophisticated are the financial and strategic investors that Sandler identified?

A All very sophisticated. I guess what I didn't talk about I guess is the financial investors. You know, we're also one of the leading capital raising institutions as well, so we have a long roster of investors that we talk to on a regular basis.

I mean, we're selling stock for equity or debt for a particular institution, we have a lot of people that have interest, so we have relationships all over the country and parts of the world that have interest in investing in U.S. financial institutions.

Q Okay. Now, how sophisticated are the financial and strategic investors that you identified?

A I would say very sophisticated.

Q Do you have an understanding whether those financial and strategic investors were familiar with the potential for executing bank M&A transactions in bankruptcy?

A Since the end of 2010, as I mentioned, America West completed a bankruptcy, a 363 transaction at the end of

2010, and that became a very hot topic in the industry. There are a lot of institutions in the same position as First Mariner, and this became a tool or a structure I should say that became a consideration for a number of institutions, as a way to resolve their financial and capital issues.

Q Of the investors and potential acquirers that you contact -- you've contacted over the past four years, approximately what proportion, if any, raised the issue of a bankruptcy transaction with you?

A Well, we went through fairly significant marketing of a recapitalization of the holding company specifically in 2011. And the result or the reply we kept running into with the various investors is that, you know, First Mariner Bancorp should consider a 363 transaction, and then if they did so, then they would have interest in pursuing an investment.

Q How many parties has Sandler O'Neill contacted in connection with its various marketing processes?

A I'd say approximately 135.

Q And what's the division strategic versus financial?

A Thirty-five strategic or so, a hundred would be financial investors.

Q Please describe briefly without going into great detail the initial transactions that Sandler O'Neill undertook on

behalf of the bank in 2009?

A In 2009, the -- we talked about the various alternatives in the capital plan that we presented to the board and they wanted to pursue what we call a rights offering. A rights offering is an offer made to the existing common stockholders to see if they would like to buy their pro rata share of the stock.

We thought that probably would not have a whole lot of success. We were not an underwriter in that transaction, but nonetheless, that's what the company they decided they wanted to do.

They went out, they pursued a rights offering, had limited success, then we decided we would open up that offering to be more of a community offering, anyone in the community who really wanted, or anyone in the country for that matter, who wanted to invest could invest. And the result of that offering was that they raised 10.9 million.

In addition, another transaction we undertook at about the same time, is we were able to get some of the board and management of First Mariner to buy some of the trust preferred that was out in the marketplace, and exchange it for equity in the bank thereby reducing the debt load at the holding company and increasing its equity capital.

Q And did those transactions resolve First Mariner's financial and regulatory problems?

A No. Those transactions were not significant enough themselves or collectively to resolve the minimum -- meet the minimum regulatory capital requirements.

Q After you completed the rights offering and the TruPS exchange, did there come a time that Sandler O'Neill pursued a recapitalization of the holding company?

A We did. Following, you know, the rights offering and debt buy back, we pursued a recapitalization of the holding company.

Q Approximately when was that?

A I think it probably would've started towards the end of 2010 through 2011.

Q And why did the bank pursue this transaction first?

A Well, we always, as I mentioned earlier, I always focused on trying to maximize the value or limit the harm done to the company stakeholders, the trust preferred holders, or the common holders. And by getting someone to put capital into the holding company, that would greatly increase their ability to -- they had been deferring on their interest payments on their debt, then they would have capital at the holding company that they could use to come current on that debt.

The regulators would not allow capital to come from the bank to the holding company. That was a limitation put on the company by the regulators.

Q What type of investors did you solicit for recapitalization of the holding company?

A We went out to financial investors and, you know, over a hundred were contacted.

Q And what did you do to solicit those investors?

A We again sat down, conducted our due diligence of the company at that point in time, we developed a confidential information memorandum that described the transaction we were looking to undertake, described the finances and the benefits of -- to an investor of investing in this franchise.

We then organized a list of potential investors that we would contact. We contacted them and got them to sign non-disclosure agreements, and then we would take the management team out on the road to have meetings with each or as many of those institutional or financial investors as we could.

Q And how did the investors you contacted respond to the solicitation?

A There were numerous people who were interested and wanted to take a look at the opportunity, but in their analysis, as they started to peel the onion and look at, you know, what First Mariner had to offer, they declined to pursue the opportunity.

Q And to what extent, well, you've already mentioned that investors discussed with you the possibility of a bankruptcy

transaction.

A Yes, the -- you know, there were numerous hurdles, were obstacles that the investors saw. The debt at the holding company was significant in relation to the equity of the holding company. As of March 31st, 2011 the company went from having positive equity to negative equity at the holding company.

So any capital that someone would put in, if you put in a dollar, it would not be worth a dollar in terms of value of the company after that, because there's negative equity.

In addition, the company's loan portfolio was -- had a significant number of non-performing assets, loans that were not paying on their interest or principal. And the balance sheet also had shrunk to some degree where the operations of the company were such that the assets were -- the yield on the assets could not carry the expense of the company.

So you had four issues. You had a lot of debt, no equity, a lot of non-performing assets in a company that was losing money on an operating basis.

Q After that solicitation, did First Mariner receive a proposal from financial investors?

A We did, Priam Capital approached us in 2011, early 2011. They had interest in making an investment in the company, 36 million with the caveat that we had to go and raise the rest of the capital, which was $160 million plus a

$15 million rights offering, so a total of 175 million.
Q And did the company pursue that transaction?
A Vigorously, yes.
Q And why did it do so at that time?
A We felt like, you know, having a good strong lead investor like Priam Capital is a group that, you know, Howard Feinglass who leads Priam Capital is a former partner at Ozzie Partners, so he's a sophisticated investor. He had capital and access to capital. We diligenced his -- who his limited partners were, and the fact that they had capital, but also Howard is from Baltimore, went to Gillman High School, and had a real passion for Baltimore.
And he wanted to see First Mariner survive. He wanted to be involved. And he brought that passion right from 2011 through on -- on throughout this process.
Q And was the transaction ultimately consummated?
A No. We were not able to get other investors that had the same level of conviction as Mr. Feinglass from Priam Capital.
Q As its solicited interest in recapitalization transaction with Priam Capital or rather a recapitalization transaction in 2011, did the debtor also solicit interest in a transaction from strategic investors?
A We did. You know, going through the recapitalization discussion, and hearing the feedback from the market, from

the financial investors that really they recommended that we would complete a 363 transaction, we felt that, you know, in a 363 transaction that is fairly dire for the stakeholders. And essentially the common would get probably zero, and the trust preferred holders would probably get pennies on the dollar for their debt.

So that was not a transaction we wanted to pursue. We really vigorously trying to protect the value for the stakeholders in the company.

Q Okay. And what did you do to market the holding company to strategic buyers in late 2011?

A Well, we decided that at that juncture after having an unsuccessful recap, we felt like trying to sell the company at that stage was the right thing to do. So we went through the process of developing another confidential information memorandum. We organized an on-line data room, and prepared ourselves to contact prospective buyers.

Q By the way, what benefits would a sale of the holding company have had for the company stakeholders that a 363 sale did not provide?

A Well, clearly the trust preferred, as I mentioned, was one of the four major issues that this company had. A bank holding company could absorb that debt and assume the obligation for that debt, and in my personal opinion, I thought that the debt was relatively cheap capital, tier one

capital, which is important regulatory capital in the industry.

So I thought it would be advantageous for a bank to be able to buy the holding company and absorb that capital as capital for the acquiring institution.

Q I can't recall if you told me this, but how many strategic buyers did you go out to?

A We went out to approximately 35 strategic buyers at that point.

Q And how did they respond to your marketing effort?

A We had I think it was four parties that wanted to pursue some level of due diligence. BD&T, TDBank, Bay Bancorp as it's known today, and Northwest Bancshares.

Q And what proposals, if any, did First Mariner ultimately receive?

A We did not receive any proposals to complete a transaction. There were some people that conducted due diligence, and did not want to proceed after due diligence.

Q After the termination of the recapitalization transaction and the marketing efforts or strategics, did there come a time when First Mariner and Sandler O'Neill also solicited interest from financial investors in a bankruptcy transaction?

A We did. You know, following, you know, that was the strategic -- the pursuit of a sale to strategics was the

fall of 2011. Following that, the next step in the process we felt like as our options were even more limited at that point in time, so we had interest from Priam Capital and others to pursue a 363 transaction as suggested by the investors that we had contacted in the recapitalization effort.

Q How did the decision to pursue a bankruptcy transaction relate to the failure of the prior recapitalization and sales effort?

A It was really directly related because we went out and talked to, as I mentioned, over a hundred potential investors, and the drum beat was, you know, this is a company that was made for a 363 transaction, and that's the only structure at that time that they would have considered.

Q What did Sandler O'Neill do to solicit interest in a 363 transaction?

A We put together another confidential information memorandum, refreshed our data room with new information. We went out to some of the investors that we had contacted in the recapitalization effort. We had Priam as our lead investor at that point in time, they had committed to take up to 24.9 percent of that offering. So we really only had to raise 75 percent of the capital. And then we contacted some additional parties that we had not contacted initially.

Q And did -- at this time, did Sandler O'Neill solicit

interest in purchases of less than a hundred percent interest in the equity of the bank?

A We would be happy if someone would've come along and considered a hundred percent acquisition of the bank; however, when you have a regulated entity like a bank, you cannot just come in and decide that you want to buy a hundred percent.

If you have regulatory approval from the federal regulators, then yes, you can pursue an acquisition of a hundred percent. If you are an investor in a bank, and you crossover a certain threshold, you will then be deemed a bank holding company. And most investors do not want to be deemed a bank holding company because it comes with regulation of that entity.

So if I am a PE fund and I go over say, 24.9 or over 33 percent, depending on how the transaction is structured, then you'd be deemed a bank holding company and the PE fund would then be subject to examination by the Federal Reserve and the scrutiny that comes with it.

In addition if that institution were at a later date to become distressed itself, that entity would be a source of strength, where that entity would have to sell other assets and push it down into the bank to protect the bank from eventual failure.

Q What impact, if any, did soliciting interest of 25

percent or less have on the range of potential investors?
A Had no effect. I mean, I think that potential investors were happy that there was someone who was already involved, had done a lot of due diligence, and had the commitment to the project.
So, you know, as you can imagine, it's easier to raise 75 percent of the capital than a hundred percent of the capital.
Q How many financial investors are organized to invest a hundred percent of the equity in the bank?
A There are a handful of financial investors that had previously applied to be a bank holding company, and I would kind of consider those in the strategic side, strategic buyers. So outside of those handful, and those handful we contacted in the -- in this sale process in 2011, other than that, pretty much no one wants to become a bank holding company.
Q So there are many more financial investors who are interested in minority stakes?
A Multiples, more, yes.
Q The committee has argued that the marketing process was inadequate because you only solicited interest of 24.9 percent or less in the bank, do you agree with that?
A I disagree.
Q Why?

A I just stated it, as I said, it's easier to raise 75 percent of the capital than it is to raise a hundred percent of the capital. We had a committed investor, who was passionate, who's from Baltimore, he had done a good job of -- you know, part of his limited partnership consisted of local businesses or local businessmen, I should say that are knowledgeable and highly regarded people within this community, who could also become customers of the bank following the transaction. So there were certainly benefits to have Priam as a partner in this process.

Q In your opinion, what would've been the impact on the range of potential investors if Sandler O'Neill had only marketed only a 100 percent interest in the bank?

A Well, as I said, the only parties that would have interest would be strategic buyers, and we had gone down that road. And that does include PE funds that have formed entities solely to be a bank holding company.

There are some that, you know, they raised a billion dollars, they had no bank, but it was a bank holding company and we approached all of those parties as part of the process.

Q The committee has also suggested that the marketing process was inadequate because you marketed a Section 363 transaction with a committed investor. Do you agree with that?

A I don't. As I said, I disagree, I think it was a benefit to market with at least 25 percent of the capital already in place.

Q And what response did you receive from financial investors to your marketing?

A We had one very sophisticated bank investor called Pinebrook Road Partners signed on to participate as a 24.9 percent investor. So at that point then we had two sort of co-leads I would call it, and we started to really get some traction after that, and you know, things were going pretty well through until about the middle of 2012 I guess.

Q And what happened then?

A At that point in time, we had to, you know, arrive at the price at which the investor group would pay the holding company for the hundred percent of the stock in the bank, and we weren't able to agree on what that price was.

Q After that transaction terminated, in August 2012, did the bank -- did First Mariner again attempt to market the assets to strategic investors?

A Yes, it was like every fall when the leaves changed, we marketed First Mariner Bank for sale, so the fall of 2011, 2012 and 2013, we marked the company for sale.

Q And who did Sandler contact?

A We went back to a subset of the 35 banks that we had contacted a year before, and added some new names to that

list, and so it was probably 20 or so institutions that we talked to at that point in time.

Q And what type of transaction did you solicit?

A We were pretty open, let the -- we wanted to let the buyers dictate to us what they wanted to pursue as a transaction. As I mentioned, you know, we knew that the 363 was an option, but it had detrimental or harmful effects to the stakeholders, so we weren't going to pigeon hole the institution in that way. We were hoping that one bank holding company would see the light and say, yes, that is capital debt trust preferred, I'd like to have on my balance sheet to fund my bank.

Q And did the company -- did there come a time when the company received a proposal from a strategic investor in the fall of 2012?

A We did. It introduced a relatively new bank holding company. In 2009, there were only 300 million in assets and they had grown rapidly to be 2 billion in assets at the time that we engaged in dialogue in the latter part of 2012.

Q And what type of transaction did that bank propose?

A That bank submitted a term sheet that proposed a prepackaged bankruptcy transaction that would provide reasonable value to the common holders and the trust preferred holders.

Q And what negotiations occurred concerning that

proposal?

A It was a heavily negotiated transaction. So we proceeded beyond the term sheet stage and into full due diligence.

Q And how did the parties' negotiations conclude?

A The parties -- we did not conclude favorably. We felt like it was unlikely that this bank would receive regulatory approval within a reasonable period of time.

Q Why do you say that?

A This company had a number of banks that it had already announced transactions with. They were public announcements, and they were going through the regulatory process. And one of those transactions had been outstanding for a significant period of time.

So we knew that there was a question in our mind as to why that delay had been taking place. So the counsel for First Mariner had conversations with the various regulatory authorities, and it became clear that -- you know, never are communications with the regulators abundantly clear, but you get a general sense of things.

And it was deemed that the approval process for a transaction between this bank and First Mariner would take an extended period of time and even over a year.

Q After the termination of discussions concerning the prepack proposed by the bank, did there come a time when

First Mariner and Sandler O'Neill received a proposal for a second prepackaged plan of reorganization from financial investors and the holders of certain -- of the trust?

A Yes. Going back to the middle of 2012 in the 363 transaction with Priam and Pinebrook, and as I mentioned, we had a lot of dialogue regarding price, and we couldn't come to an agreement on price.

Well, one of the things that we talked about is we said, you know, one way to get value to the trust preferred holders, let alone the common holders, is do a prepackaged bankruptcy transaction instead of a 363 transaction. And we had a lot of dialogue with the trust preferred holders about such a structure and they were in favor.

So after we shopped the company and this bank holding company, the sale to this bank holding company didn't come through, we re-engaged with Priam and Pinebrook and pursued a prepackaged bankruptcy transaction with terms that were much more favorable and palatable to the stakeholders of First Mariner.

Q By the way, who are a few of the TruPS holders who were involved in that prepackaged transaction?

A Well, there was one entity called Hold Co Advisors who holds itself out there as an expert in dealing with trust preferred. And their clients are the trust preferred holders themselves, and it may be some of the people in this

room frankly.

And so we had extensive dialogue with Hold Co advisors, and we explained to them that it was our intention to try to protect and preserve the value for the trust preferred holders as best we could throughout the process, no matter which transaction we were pursuing.

Q And what role, if any, does Hold Co advisors have on the official committee of unsecured creditors?

A Say that again.

Q Does Hold Co advisors have any rule in connection with the official committee of unsecured creditors in this case?

A I believe that he's -- they're a committee member.

Q Okay. After you received a proposal for a prepack, what happened?

A We pursued that vigorously. Now again, when you have a bank, clearly Priam and Pinebrook themselves had more than enough capital to capitalize this institution on themselves, but they did not want to become a bank holding company for all the reasons we described earlier.

So you've got two 24-9 investors available, so we had to raise the rest of the capital, the other 50 percent. And ultimately we were successful in getting all that capital committed.

Q And -- but was the transaction consummated?

A The transaction was not consummated, you know, we had

again, this is -- people that had been looking at this institution for a long period of time, and one of the requirements in the cease and desist order from the FDIC and the State of Maryland was that the company had to have a tier one leverage ratio of seven and a half percent.

And through the course of our modeling and those models were developed in conjunction and had input from the private equity investors themselves, and they understood all throughout the process what we were looking at in terms of ultimate results and returns from that -- from the offering and the structure of the transaction.

In the end, they felt like the tier one leverage ratio was too low, and they refused to pursue the transaction further, at least one of those parties I should say.

Q After the termination of that proposed prepackaged plan of reorganization, did there come a time when First Mariner and Sandler O'Neill again marketed the company to strategics?

A We did. And as I said earlier, in the fall of 2013, guess it was August of 2013, we went out and we marketed the company to strategic buyers once again.

Q And what types of transactions -- what type of transaction did Sander O'Neill inform strategics it was interested in, if any?

A Well, once again, we tried to hold out hope that one

bank holding company would see the real benefit of buying the holding company of this institution, and reaping the benefits of that relatively cheap capital.

And as I mentioned earlier, 2012, I concluded the sale of Annapolis Bancorp to FNB Corporation. They're a $14 billion institution out of western Pennsylvania, so this was a new buyer in this market. So we felt like there was real opportunity.

Later we had sold Baltimore County Savings Bank to FNB as well. So it just turns out that First Mariner extends from about where Baltimore County's franchise is all the way down to Annapolis, where Annapolis Bancorp's franchise is, so this was a perfect fit in between those.

So we felt like, you know, if anyone's going to buy this, you know, it's going to be FNB because it really fits strategically for them, and we were hoping that maybe some of the improvements in the economy would've led them to say that the loan credit quality had stabilized, and they now had the ability to cut a lot of costs that would solve the operating performance issues of the company.

So we thought there was a real chance we could sell the holding company to FNB or someone else who might have interest.

Q At this time, did Sandler O'Neill solicit interest in any particular type of transaction?

A We did not.
Q Why not?
A We were hoping for the silver bullet that would save the trust preferred and the common and the holding company all at once.
Q The committee has argued that this marketing process was inadequate because Sandler did not explicitly solicit participation in a Section 363 transaction. Do you agree with that?
A I do not.
Q Why?
A You know, we knew going into the marketing process that we were going to get bids that said, we will only pursue this company through a 363. And as I mentioned, we'd been marketing this bank formally three times, you know, '11, '12 and '13, informally through the whole process, we were always having dialogue with various buyers for banks in this market, always holding out hope that we would have someone come forth and buy the institution.
Q To what extent did strategic investors raise the possibility of a 363 transaction?
A We received one letter from FNB as we had hoped, that did not use the word bankruptcy explicitly, but if you read the transaction, the only way that transaction could be accomplished would be through a bankruptcy transaction.

In addition, there was a bank, National Penn that we have had extensive discussions with over the years about their interest in coming from -- you know, their primary market is, you know, the greater Philadelphia market, and we were hoping that they would cross the border and come down into Maryland and take advantage of this great opportunity to build a franchise in Baltimore.

They looked at this closely, they came down to visit and spent hours with management, going through the business, and in the end said that they would pursue a 363, but would not give us a letter, an offer. So all we had to present to the board was they have interest, but they have not yet come to the table.

So we pursued National Penn from August through November to try to convince them to make an offer for the institution, and really engaged in the due diligence process and negotiating process.

Q And were you ever able to obtain an offer from them?

A No.

Q Okay. And what happened with FNB?

A FNB, they came in, they conducted full blown loan due diligence, and we know that they are sticklers for credit, and they looked at the loan portfolio and they said to themselves, that they thought that the company was -- they would not pursue a transaction with the company.

Q Okay. Did they ultimately make a proposal?
A They did make a revised proposal which they only offered to purchase six branches, 300 million in deposits, and 75 to a hundred million of the company's best loans.
Q And what was your view of that proposal?
A We felt like it was -- we felt it was problematic, because it was taking the best branches out of the -- it was like buying the center of the donut and leaving all the branches that were further afield, so reducing the franchise value of the company.

Also, they were going to buy our best loans, which reduced -- which increased the percentage of non-performing loans as a percentage of performing loans, which makes you look either furthermore like damaged goods.

And we thought that the FDIC would have a problem with us selling branches in that magnitude at that stage in the game.

Q Other than First -- other than FNB and National Penn, what interest did you receive as a result of your marketing effort to strategics in 2013?
A We had no other indications of anyone wanting to come to the table.
Q Did there come a time when First Mariner received a term sheet from RKJS?
A I believe it was November 8, 2013, we received a term

sheet from RKJS.
Q What is RKJS?
A It's an entity formed by two gentlemen, Rob Kunisch and Jack Steil, so RKJS. And those individuals were heavily involved in some of the previous transactions we were considering.
Q Who are Mr. Steil and Mr. Kunisch?
A They are people that grew up and live in the Baltimore area. They spent their -- pretty much their entire careers here as bankers in Baltimore. Probably -- most -- part of their career they worked for Mercantile Bancshares which is one of the preeminent banks that's ever operated in Maryland or the Mid-Atlantic, let alone just Baltimore.
Q And do they -- are there investors in RKJS?
A Yes, they are investors in RKJS.
Q And who and how many?
A They are supported by Priam Capital, GCP Capital, Patriot Financial, and the family office, and then they also have a handful of successful business people from the Baltimore community that are supporting their effort.
Q What did the RKJS term sheet propose in the way of a transaction?
A They proposed a 363 transaction.
Q And -- 363 transaction to purchase the shares of the bank; is that right?

A That's correct, to buy a hundred percent of the stock of the bank from the holding company.
Q And after the company received the term sheet, what did it do?
A The company considered its options once again. We went back to FNB and to National Penn with the hopes that they would come forward and make a more attractive proposal, but they both refused.
Q What negotiations, if any, were there concerning the RKJS term sheet after November?
A You know, there were a lot of things in that term sheet that were unpalatable. We negotiated some of those items and were successful in some regard and unsuccessful in others.
Q And did the parties -- what, if any, terms were you successfully able to change?
A The break-up fee was proposed at 3 percent, so you know, they have a hundred million dollars raised, so that'll be $3 million, we were able to negotiate that down to $1 million. We were also able to increase the purchase price from $4 million to 4 million 775.
Q Did there come a time when the parties entered into a binding a term sheet?
A I believe it was on November 21st if my memory serves me correctly that we -- that the board signed the term

sheet.
Q Now, you mentioned that you had spoken -- after initially receiving the term sheet, you spoke with both FNB and National Penn, what did you say to them?
A We said that we had received a term sheet, proposing a 363 transaction, and that transaction requested exclusivity for a period of time, and we wanted to see if National Penn or FNB would change their mind and come to the table and engage in dialogue and negotiations for a transaction between one of those two companies and First Mariner.
Q And what, if anything, did they do in response?
A They said no, thank you, go ahead and sign the term sheet, enter into your exclusivity, don't worry about us.
Q Now, at your deposition a week or so ago, counsel to the committee asked you whether you had quote shopped unquote the RKJS term sheet between November 8 and November 21. Do you recall that?
A Yes.
Q And you said no, is that right?
A That's correct.
Q Why did you say that?
A When I think of the word shopped, I think about that formal process that we talked about, putting together a confidential information memorandum that explains their transaction, putting together a formal model that you put in

the book, so that people understand the transaction from a financial perspective, put together a list of potential parties that you'd go out and engage dialogue with, and then going out and conducting that marketing process. To me, that's what shopping a transaction means.

Q And did you do that in connection with the November 8 RKJS term sheet?

A We did not.

Q Okay. After entering into the binding term sheet, did the parties proceed to negotiate a definitive agreement?

A They did.

Q And I would ask you to turn to Exhibit 1 in your binder, and that's Debtor's Exhibit 1, and tell me what that is.

A That looks like the merger agreement between First Mariner Bancorp, First Mariner Bank and RKJS Bank.

MR. O'NEILL: I'd offer it into evidence, I believe the committee has stipulated.

MR. BROWN: Yeah, no objection, Your Honor.

THE COURT: Debtor's 1 is admitted.

(Debtor's Exhibit No. 1 received)

BY MR. O'NEILL:

Q Very broadly speaking, what is the structure of the transaction proposed in Exhibit 1?

A RKJS would form a Maryland trust company that is a non-

FDIC insured company, they would capitalize that company with a hundred million dollars. They would then pay the First Mariner Bancorp the purchase price of 4 million 775, and then -- for a hundred percent of the stock of the bank, and then they would merge that bank in with this interim entity, the RKJS Bank.

Q Do you believe the $4.775 million purchase price is fair and reasonable consideration for the debtor's equity in the bank?

A I do.

Q Why?

A Because we had marketed the company for sale for the last four and a half years, and this was the only group that had any passion or desire to really pursue this opportunity vigorously with all the issues it has, first and foremost.

Secondarily, when you look at the company -- the bank's balance sheet, and we're specifically talking about the bank, not the holding company, while there's equity at the bank level, if you mark the balance sheet to market, there can be made a case that the equity would be eroded quickly and that there really isn't any equity in the company.

Q In your view, would the $4.775 million purchase price have been available to the debtor without the contribution of the recapitalization amount?

A No. You can't take one without the other. You have to

look at this problem as a two pieced problem. You have to resolve the bank in order to get or you have to resolve the holding company's issues in order to get the bank, so you have to look at the two pieces together.

Q And why is that?

A Because the bank is an under-capitalized institution, and the regulators will not give you approval to complete a transaction unless you capitalize that institution to the extent that's acceptable to the regulators.

Q Did you get comfortable that RKJS would receive regulatory approval?

A I felt like -- well, we engaged in dialogue with the regulators, and didn't have any objection, but you know, people like Rob Kunisch and Jack Steil, they're upstanding members of the community, they have a long history of banking in the Baltimore market. They're exactly the type of people that the FDIC hopes will come forward and lead institutions in this country.

Q Under the terms of the agreement that's Exhibit 1, can the purchase price change?

A It can, yes.

Q How?

A If at closing the bank's equity drops below 29 million, the price can be reduced on a dollar-for-dollar basis.

Q And did the boards -- did the debtor's board approve

the transaction that's embodied in Exhibit 1?
A Yes.
Q What, in your view, would be the consequences to the bank if it did not enter into the M&A transaction?
A This is the point where it gets pretty sensitive, Your Honor, I'd like to -- this is --
MR. O'NEILL: Why don't I hold the question, Your Honor.
THE COURT: All right, that's fine.
BY MR. O'NEILL:
Q Are proposed alternate procedures an aspect of the agreement that is Exhibit 1?
A Say that again. Sorry.
Q The auction procedures are a term of the agreement to Exhibit 1, right?
A Yes.
Q The parties agreed on -- meaning RKJS and the debtor agreed on auction procedures as part of the (indiscernible) deal; is that right?
A Correct, they were presented in their term sheet.
Q And we heard this morning that the procedures that were originally agreed have been modified and presented to the Court in modified form; is that right?
A That's my understanding, yes.
Q Would you take a look at what's been marked as Exhibit

5 in the binder?
A I would love to, but Exhibit 5 is not in my book.
MR. O'NEILL: Do you have it then?
THE COURT: I do. Okay. Well, I have something that says -- behind the tab as Exhibit 5, yes.
MR. O'NEILL: And is it a red line, Your Honor?
THE COURT: Yes.
MR. O'NEILL: Okay.
BY MR. O'NEILL:
Q What is that?
A That is a copy of the auction procedures as adjusted.
MR. O'NEILL: I would offer that in evidence, Your Honor.
THE COURT: What is intended to be offered as Exhibit 5 is the same thing as what is on file --
MR. O'NEILL: Yes, Your Honor.
THE COURT: -- as part of document 118?
MR. O'NEILL: Yes, Your Honor.
THE COURT: All right. Is there any objection?
MR. BROWN: No objection, Your Honor.
THE COURT: Exhibit 5, Debtor's 5 is admitted.
(Debtor's Exhibit No. 5 received)
BY MR. O'NEILL:
Q How were the auction procedures developed?
A The original terms of the auction procedures were

presented in the term sheet that we received on November 8th.

Q And were they negotiated?

A Yes.

Q By whom?

A Legal counsel.

Q And what role, if any, did you have in that process?

A I did not really get involved with the negotiation of the specific auction procedures.

Q But you were familiar with the procedures?

A Yes.

Q Let’s talk just in terms of categories. I think first, let’s talk about the 30-day timeline.

What is the proposed bid deadline?

A Thirty days following this hearing, which would make it April 6th.

Q You’ve run many M&A processes on behalf of banks and purchase of bank assets, in your opinion, can an interested party conduct due diligence and make a binding offer in this case within the 30-day time limit?

A Absolutely.

Q Why do you say that?

A Typical timeline for someone to conduct due diligence when we are on the sell side is, we give people two to three days.

Q And parties are able to comply with that; is that right?
A Every time.
Q What impact, if any, does the extensive prepetition marketing process have on the ability of bidders to conduct due diligence quickly?
A I think that any potential interested party that is sophisticated and has the capital to recapitalize the bank will be able to move quickly enough to be in compliance with the timeline.
Q Okay. Can you give me an example of -- strike that.
Are you aware of a party who has conducted due diligence in this case and in this transaction within a period of less than 30 days?
A Well, we were going through the process on the initial term sheet on November 8th, there was one party that was listed as putting in $20 million as part of their group.
Q This is an investor in RKJS?
A That's correct. And --
Q What happened with that investor?
A That investor decided to withdraw from the process, so we had to go out and market the transaction to try to find a replacement investor.
Q And who did you market the transaction to?
A We went to financial investors, and we were able to

secure Patriot Financial as a replacement.
Q And how long did it take Patriot to conduct its due diligence and commit to the transaction?
A It was done very quickly.
Q How quickly?
A They were done in -- from the first time we talked to them, to the time they said yes, was probably no longer than three weeks.
Q Have you seen other auction processes run effectively in less than the 30-day time period?
A Yes.
Q How often?
A Well, frequently, but you know, if you look at FDIC assisted transactions, you know, distressed companies, they're sold -- typically the government will let all the prospective bidders know, they open up a data room, they give them some materials, and expect bids within three weeks, and then close that weekend.
Q Are there any benefits to running an auction in March and April?
A Well, you don't have any, you know, big times for vacations that you would in say like August or at the end of December. So, no, I think it's a good time to conduct a process.
Q And what efforts is Sandler O'Neill making to market

the company?
A We have developed and -- our list of potential parties that we're going to go to, we have put together a new confidential information memorandum, we have put together with the help of the company an updated data room, so we are ready to go, and this week it was determined we have a no shop provision, where we weren't allowed to go out and contact anyone until after this hearing. I guess it was part of the discussions between the committee and First Mariner, it was determined -- and RKJS, I should say, we were allowed to begin that marketing process, so we did.

We had -- National Penn actually came to company headquarters on Wednesday, and they spent three hours with the entire senior management team going through all aspects of the institution.

We have contacted others and already started to receive -- send out non-disclosure agreements as requested by those potential bidders.

Q You said you had discussions with the committee. To what extent has the committee suggested entities to whom you might market this transaction?
A I received the list this morning about 6 a.m. of additional parties that we should consider, both financial buyers, and strategic buyers.
Q And how many of those people had you not previously

contacted?
A There are a handful that we hadn't previously contacted on either list.
Q In your opinion, would an extension of the 30-day bidding period benefit or harm the estate?
A I think it would be harmful to the estate to extend the timeline.
Q Why do you say that?
A Because as we've gone through in our discussion here today, you can see the numerous efforts and variations of transactions we have been through, particularly with private equity investors. And they're a fickle bunch, and they walk away from transactions pretty easily.

I mean, when we had the pre-pack and, you know, the model showed we were going to be off by 20 basis points, and they refused to proceed to closing. I mean, after a tremendous amount of time and effort.

So I worry every single day about, you know, investors changing their mind. It's not -- you're not dealing with one entity, you're dealing with a whole group of people that all have to be of like mind and thought at a given point in time.
Q And why, if at all, does the passage of time increase the risk of an investor might walk?
A As I mentioned earlier, this company, one of the most

debilitating issues it has, is that the asset base does not generate enough earnings to carry its expense base. So every day the doors are open, equity is dwindling and the company is losing money.

In addition, you know, I'm not a credit expert, but I do understand some of the loans that are in the loan portfolio, there could be a loan that goes bad or suffers losses at any point in time.

Q Are there any other risks that might be -- that the bank might incur if the bidding deadline is extended?

A There are, but I'd prefer --

Q To what extent might employees leave?

A They're -- that's always a risk that you could lose employees and customers. I mean, as I mentioned, the balance sheet is shrinking, loans are paying off, and you know, employees may decide to leave also.

MR. O'NEILL: There are some other risks, Your Honor, that I won't ask about because of confidentiality.

THE COURT: All right.

BY MR. O'NEILL:

Q In your opinion, what impact might the extension of the 30-day marketing period have on the stalking horse bidder, RKJS?

A They may decide that they want to walk away. There is a -- in the definitive agreement there is a what we call a

drop dead date, a date at which either party can walk away without any repercussions and that is April 30.

Q Do you agree with the committee's assertion that the no shop provision in the agreement that's Exhibit 1 is harmful to the prepetition and post-petition marketing processes?

A No, it's common language. It's in all the definitive agreements that we enter into on behalf of our clients, so it's pretty common language.

Q Has the no shop provision prevented Sandler O'Neill from communicating with anyone who is interested in participating in the marketing process?

A No. We have people that call from time to time, and of course, when the transaction was announced, we did have a number of calls, but most of those were parties just interested in knowing what was going on.

Q And National Penn, I guess, expressed interest, and it took a day or two, but you got them into -- we got them into the data room; is that right?

A Correct. They showed interest and we invited them to come down to the company and specifically begin their due diligence, together with the entire management team. The entire management team spent hours with National Penn trying to refresh their memory as to what they already knew to be true previously.

Q What's the stalking horse bidder fee?

A The stalking horse bidder fee consists of two parts. One part is the break-up fee and the other part is the expense reimbursement.
Q And what are the amounts of those two components?
A The break-up fee is a million dollars. As I mentioned earlier, we brought it down from 3 million to 1 million. And the expense reimbursement is a million 775.
Q Do you have experience in negotiating break-up fees and expense reimbursements?
A Yes.
Q In your opinion, will the size of the stalking horse bidder fee have any effect on the willingness of potential investors to bid at auction?
A No, no, I don't --
Q Why is that?
A -- think so. I say that because you have to recapitalize this institution, so when you look at the financial commitment from a buyer or a strategic investor, it is not, you know, 4.775 million, it's the 80 to 100 million dollars that you have to hold against those assets or infuse into the company to capitalize the institution so it may meet the minimum regulatory requirements as discussed in the cease and desist order, and in the written agreement with the Federal Reserve.
Q The committee has argued that the size of the stalking

horse bidder fee should be judged in relation to the amount of the purchase price flowing into the holding company. Do you agree with that?

A I disagree. I know that in other M&A deals, you look at the purchase price in relation to the break-up fee. In this case, you have to include the recapitalization amount when you're thinking about it, because that is the entire financial commitment.

Q In your view, is it -- strike that.

What is your understanding of whether the recapitalization amount will be contributed at closing or after closing?

A The recapitalization amount has to be contributed -- well, with the RKJS are you asking or just --

Q Yes --

A -- anyone?

Q -- in this transaction.

A On this transaction, they will fund the RKJS Bank prior to the closing of the transaction, then at closing, merge that bank into First Mariner Bank.

Q In your opinion, is the stalking horse bidder fee in this case fair and reasonable?

A Yes.

Q Why?

A As I mentioned, I think you have to look at this

holistically, you have to look at the recapitalization amount with the purchase price, and that's the entire financial commitment that one must make to be successful. I mean, you cannot show up at this auction and say I've got, you know, 4 or $5 million and expect to win the day. You have to capitalize the institution.

Q Let's talk a little bit about the expense reimbursement. The amount of that is -- it's capped at $1.75 million; is that right?

A Correct.

Q And in your view, is that amount reasonable for an expense reimbursement on this transaction?

A Yes.

Q Why?

A This is a complex transaction, as you can see by the amount of professionals that are in this room. It's a -- it's not a process, as I said, there's been less than ten of these transactions completed. There are a lot of issues, you have regulatory issues, you've got bankruptcy issues, I mean, this is an evolved process.

So I think that, you know, while we tried to reduce those amounts, I think that any expenses that they incur to actually resolve this institution once and for all should be reimbursed as part of the process.

Q And we talked a little bit earlier about the fact that

RKJS has multiple investors. Do you recall that?
A Yes.
Q And to what extent have each of those investors conducted due diligence?
A The largest investors have conducted significant amounts of due diligence, and the smaller investors have conducted less so, but each of the parties has conducted their own due diligence.
Q And many of the investors had not previously conducted due diligence; is that right?
A Correct.
Q What is the recapitalization requirement?
A Any party that comes to purchase First Mariner Bank has to commit to recapitalize the institution.
Q In any particular amount?
A In the amount of 85 to a hundred million dollars.
Q The committee has asserted that the recapitalization requirement is in a quote, arbitrary condition that serves no meaningful purpose. Do you agree with that?
A I disagree.
Q Why?
A Because you -- if you go to the beginning of the story, the federal regulators said we needed to have so much capital to operate a financial institution in the US of A. So someone has to come to the table and capitalize the

institution so that not only is it well capitalized at that point in time, but also in the ensuing years after that after the company continues to incur losses in its loan portfolio, but also the company has to over time grow its balance sheet, so that the operating earnings disappear. And there's going to be a little bit of a carry a couple of years maybe before that happens.

Q What tier one leverage capital ratio is required by the cease and desist order?

A Seven and a half percent.

Q And how was the recapitalization amount determined?

A Based upon that requirement, plus the cushion, if you will, for any expected losses that could come in the ensuing years.

Q Must every competing bid satisfy the recapitalization requirement in cash?

A No, I mean, you could be a bank holding company who merges that bank into their own bank and, you know, some people think that's not placing capital against those assets, but you have to have free capital that they do allocate to this balance sheet, so that the buyer meets their minimum regulatory capital requirements following the transaction; otherwise, they won't get approval from the regulators of the transaction.

MR. O'NEILL: That's all I have, Your Honor.

THE COURT: Thank you. Is there going to be cross-examination of this witness?

MR. BROWN: Yes, Your Honor.

THE COURT: I think now would be a good time to take a short recess before we take that up. Sir, I would remind you you're under oath, even though we're on recess, which means you should not discuss your testimony with anyone. You are free to walk around, use the restroom.

THE WITNESS: Okay.

THE CLERK: All rise. Court is in recess.

(Recessed at 11:59 a.m.; reconvened at 12:11 p.m.)

(Call to Court)

THE COURT: Mr. Boyan, I remind you you're still under oath and required to tell the truth. Do you understand?

THE WITNESS: Yes, I understand.

THE COURT: All right. Before we begin let me say for the sake of clarity, while attorneys are permitted to use electronic devices like computers and laptops, I-Pads and such in connection with their presentation of the case, the use of any kind of electronic device in a courtroom, or by those in the gallery for any purpose is not permitted during this hearing, and I am expecting everyone who's in the gallery to have their electronic devices in the power off position.

If there's any use of electronic devices or any disruption, I'll be asking the court security officer to escort you out into the hallway, where you can deal with whatever issue you have. All right.

Cross-examination.

MR. BROWN: Thank you, Your Honor. For the record, Judson Brown for the unsecured creditor's committee.

CROSS-EXAMINATION

BY MR. BROWN:

Q Mr. Boyan, I want to start with your background. Your experience is in providing M&A capital raise and strategic advice to banks, correct?

A Correct.

Q You have never advised a bank with respect to a potential bankruptcy before this case, right?

A That is correct.

Q Never been involved in a Chapter 11 bankruptcy proceeding, right?

A That is correct.

Q Never testified in any bankruptcy proceeding, right?

A No.

Q You've never testified as an expert before in any case, correct?

A That is correct.

Q Mr. Boyan, you have never been involved in a sale

pursuant to Section 363 of the Bankruptcy Code, correct?
A That is correct.
Q You have never negotiated a sale pursuant to Section 363, correct?
A Correct.
Q This is the first time, right?
A Yes.
Q You've never run an auction with a stalking horse bid, have you?
A No.
Q You've testified on direct about all the auctions you've run, right?
A That is correct.
Q In not one of those did you have a stalking horse bidder, correct?
A That is correct.
Q You've never offered an opinion on whether a stalking horse bid provides fair and reasonable consideration for the assets subject to the auction, correct?
A Could you repeat your question, please?
Q Yeah. You've never offered an expert opinion on whether a stalking horse bid provides fair and reasonable consideration for the assets subject to an auction?
A I have never provided such an opinion.
Q You've never negotiated auction procedures for an

auction pursuant to Section 363, correct?
A That is correct; however, auction procedures in the 363 process are very similar to the procedures we follow in any auction that we conduct.
Q Okay. We'll get to that in a minute. But just to be clear, you have never negotiated an auction procedures for a Section 363 sale or auction, right?
A That's correct.
Q Never offered an expert opinion on whether auction procedures are fair and reasonable, right?
A That's correct.
Q For any auctions, subject to 363 or not, correct?
A That is correct.
Q You've never offered an expert opinion on whether auction procedures are designed to attract the maximum number of bidders at an auction, have you?
A In the auctions that we generally pursue, they tend to be more a confidential process where we would make -- deem a limited auction. We don't go out to the whole world, there's 6,000 banks, we don't ask every bank every time. We ask the ones that in our professional opinions, the ones that make sense to include in such a process.
So in this case, we actually have more freedom because it is a public process, we're going to go out to a broader audience than we otherwise would.

Q Okay. So I want to talk about that for just a second. The auctions you conduct are limited auctions, right?
A Right, we don't put it in the newspaper, it's confidential.
Q Right, it's confidential, right?
A Correct.
Q So there's a different process that you go through with respect to potential bidders, right?
A It's easier.
Q So you've never offered an opinion on whether auction procedures in any auction are designed to maximize -- to attract the maximum number of bidders, right?
A Generally, the more people that come to the party should drive the highest price.
Q I completely agree, and that's exactly my goal. I want to come back to my question one last time, Mr. Boyan.
A Uh-huh.
Q You have never offered an opinion on whether auction procedures are designed to attract the maximum number of bidders?
A Never provided an opinion, no.
Q Never provided an opinion on whether auction procedures are structured to promote active bidding, have you?
A I've never provided such an opinion, no.
Q Now, I want to talk for a minute about the marketing

efforts that you described Sandler O'Neill took, undertook from 2009 to this case was filed.

In 2009, you started with some smaller transactions trying to develop a capital plan for the bank, right?

A That's correct.

Q In 2010, Sandler O'Neill was seeking to recapitalize the bank, right?

A Correct.

Q And the holding company as well, right?

A Correct.

Q Just to be clear, Mr. Boyan, the debtor here is not the bank. The debtor is the holding company, right?

A That is correct.

Q That's the bank's parent, right?

A Correct.

Q Now, in 2010, you were marketing a potential recapitalization of the bank and the holding company to financial investors, right?

A That is correct.

Q And those financial investors told you at the time that they'd be interested in doing a sale or acquisition pursuant to Section 363 of the Bankruptcy Code, right?

A That is correct.

Q That was in 2010, right?

A 2010 and 2011.

Q At that time, those parties who indicated an interest in a 363 transaction, they were financial investors, right?
A That's correct.
Q And when you're talking about financial investors, you're talking about private equity funds, institutions with money, right?
A That is correct.
Q That's different from a strategic buyer like another bank, right?
A That is correct.
Q The financial investors raised the option of a 363 in 2010, 2011, Sandler O'Neill did not pursue that option at that time, right?
A We made recommendations to the board as to the variety of options that were available and the board did not select as an option.
Q So Sandler O'Neill didn't market the bank or the debtor pursuant to Section 363 in 2010, right?
A That's correct.
Q Didn't market the bank or the debtor in a Section 363 transaction in 2011, right?
A Not until 2012.
Q And the reason that Sandler O'Neill didn't do that is Sandler O'Neill was trying to provide a return to the TruPS and common equity holders, right?

A That's correct. We felt like the company had some relative franchise value, given its branch structure, and even its mortgage company, and being the largest in -- largest independent bank holding company headquartered in Baltimore -- MSA, I should say not in Maryland, in Baltimore MSA, we felt like there was an option where someone might come along and see the value that we saw.

Q And that is value that provides some return to the TruPS holders and common equity holders, right?

A That is correct.

Q In 2011, Sandler O'Neill was pursuing a recapitalization and it had found a lead primary financial investor, right?

A That's correct.

Q That's Priam Capital, right?

A That's correct.

Q And you described earlier on direct examination Priam Capital had been involved in a number of potential transactions involving the holding company and the bank here, right?

A Yes, they are very loyal to the process and the opportunity.

Q They're passionate --

A Yes.

Q -- as you put it, right?

A Yep.
Q Loyal to this bank and the assets that are for sale here, right?
A Yes.
Q That recapitalization transaction did not come to fruition in 2011, right?
A That is correct.
Q So in 2012 Sandler O'Neill marketed the assets of the bank through a Section 363 transaction, right?
A State that again, please.
Q In 2012, Sandler O'Neill marketed the assets here of the bank in a Section 363 transaction, correct?
A That is correct.
Q When Sandler O'Neill went to the market, it had a committed financial investor already, correct?
A That is correct.
Q And that again was Priam Capital, right?
A Correct.
Q When Sandler O'Neill went to the market in 2012 and proposed a Section 363 transaction, it only marketed that transaction to financial investors, right?
A That is correct.
Q In 2012, Sandler O'Neill did not market the bank or any assets to strategic buyers through a Section 363 transaction, correct?

A We did market the bank in the fall of 2012 to strategic buyers, we just didn't try to limit what structure they could pursue. We left it open to the buyers, there is nothing in the bidding instructions provided to the buyers that they had to bid for a 363 structure or not, we left it open, so as to protect the value of the stakeholders, the trust preferred and the common holders.

We didn't feel like we needed to judge the situation, we felt like we wanted the buyers to tell us what their interests were.

Q So we're going to get to that marketing in the fall of 2012 in a minute, I want to focus on the proposal -- the proposed 363 transaction that was on the table the first half of 2012, okay. Do you understand that?

A Yes.

Q For that transaction, Sandler O'Neill only marketed that Section 363 to financial investors and not strategic buyers, right?

A Yes.

Q All right. Now, in the fall of 2012, Sandler O'Neill went back to the market to strategic buyers, correct?

A Correct.

Q At that point in time, Sandler O'Neill sought strategic buyers' view of the value of the assets being sold, right?

A Correct.

Q Sandler O'Neill did not suggest any particular type of transaction, correct?
A We did not.
Q You didn't suggest a recapitalization, a bankruptcy prepack, or a Section 363 sale, did you?
A We did not.
Q And that's because you wanted the strategic buyer to determine the transaction in the hopes of returning some or providing some return to the TruPS and common equity holders, right?
A That's correct.
Q As you put it on direct, you didn't want to pigeon hole the institution, the holding company and the bank by marketing a Section 363 to strategic investors at that point in time in the fall of 2012, right?
A That's correct.
Q Sander O'Neill wasn't able to find a transaction from a strategic investor in the fall of 2012, right?
A We did have someone on the line who wanted to complete the transaction and First Mariner wanted to complete the transaction, we just didn't have that prominent third party that we thought would approve the transaction.
Q Well, I'm talking about the fall of 2012.
A Yes.
Q Right. And Sandler O'Neill had identified a potential

prepack bankruptcy with a strategic buyer, right?
A We did.
Q And the reason that that fell apart is because Frist Mariner terminated those discussions for fear that the transaction wouldn't receive regulatory approval, right?
A That's correct. We were concerned that the regulatory approval process would take a lengthy amount of time, which could put the company in jeopardy ultimately.
Q So now we're at the first half of 2013, and Sandler O'Neill goes back to market to propose a transaction again with Priam Capital as a committed financial investor, right?
A That's correct.
Q And this proposed transaction was a prepack bankruptcy, right?
A That is correct.
Q And the proposal was only marketed to financial investors at that point in time, right?
A Correct.
Q Now, that transaction was negotiated over the course of a number of months in 2013, right?
A That's correct.
Q Basically the first half of 2013?
A I would agree.
Q The company, the debtor here and the bank, were subject to an exclusivity provision with those financial investors

involved in that transaction, right?
A Correct.
Q The company and Sandler O'Neill abided by that exclusivity agreement, right?
A Yes.
Q And that exclusivity agreement meant that the company and Sandler couldn't market for a different or better transaction than the one they were negotiating with those financial investors, right?
A I'm not certain that that is true. We may have had a carve-out for any buyer that comes in, then we could pursue a transaction with a strategic buyer.
Q If somebody came in and through a proposal in, Sandler O'Neill or the company could negotiate over that proposal, right?
A Yes.
Q But Sandler O'Neill and the company couldn't affirmatively go out and seek a better proposal, right?
A I don't know that that's entirely true, I'd have to go back and look at the confidentiality agreement. We had numerous confidentiality agreements over the years with various parties, and we were concerned about I think what is your point, is being locked up with one investor or one strategy for a lengthy period of time.
So I know that at one point in time, we did make sure

that we had the flexibility to pursue a strategic transaction instead of the private equity process, because we were I think at that stage in the overall effort, somewhat jaded by the whole private equity effort.

Q But you continued with this private equity effort for the first half of 2013, right?

A That's true, when you contact 135 potential parties and only one or two stand up, you tend to stick with those.

Q And so you negotiated with the financial investors in 2013, but that transaction fell apart as well, right?

A It did.

Q And the reason that that transaction fell apart is because the buyers, the financial investors that included Priam were concerned that the bank would not meet its tier one leverage ratio at the close of the transaction, right?

A Yes, but it was Pinebrook that had the problem, it was not Priam. I think Priam was okay with the way we were situated.

Q Okay. So there were a number of financial investors, Priam is one, Pinebrook is another, right?

A Right.

Q And one of those investors, Pinebrook, had a problem with the fact that the bank may not hit its tier one leverage ratio if the deal closed, right?

A They used that as the excuse to get out of the

transaction.

Q That's what you were told, right?

A Correct.

Q And your understanding, as you said on direct was, the financial investors thought that the bank was going to miss its tier one leverage ratio by 20 basis points, right?

A Correct.

Q How much capital is that, Mr. Boyan?

A That's not a lot.

Q So this financial investor group walked away from a deal over a difference of a small amount of capital, right?

A They used that as their issue. We think that they had a broader concern about the company and hid behind the issue of missing by 20 basis points.

If you look at the earnings of the company, they turned pretty dire at that point. The mortgage business from time to time was really helping the company, and quickly went from a benefit to a real negative at about the same time they walked away from the 20 basis points, and they said, well, we're walking away because of this issue.

We think that in reality, the issue that the company could not make money on an operating basis was really the real issue that they had.

Q So I want to talk about that for a minute. The company was profitable from late 2011 over the course of 2012,

right?
A The company was profitable only 2012, I believe. And that was a direct result of what we called the refi, the refinance mortgage wave that led to significant earnings in 2012, and then I think the company made approximately 16 million in 2012, and then went on to lose 16 million in 2013.
Q The company was profitable beginning in late 2011 and continuing through 2012, right?
A Okay. If that's the facts, then you're right.
Q Well, I want to make sure those are the facts, right?
A If you show me the financials, I'll agree with you.
MR. BROWN: Your Honor, may I approach?
THE COURT: With what?
MR. BROWN: To refresh his recollection with his declaration, Your Honor.
THE COURT: Yes, you may show him his declaration.
MR. BROWN: Let the record reflect I'm handing Mr. Boyan Committee Exhibit 6 --
THE COURT: You need to be at the podium, we can't hear you or record if you're standing there and speaking.
MR. BROWN: Yes, Your Honor.
Your Honor, let the record reflect that I have handed Mr. Boyan his declaration, Committee Exhibit 6 submitted in this matter.

BY MR. BROWN:

Q Mr. Boyan, do you have Committee Exhibit 6, your declaration in this matter?

A I do.

Q You recognize it to be the declaration that you signed and was filed at the beginning of this bankruptcy on February 10?

A Yes.

Q Let's turn to paragraph 23.

A Okay.

Q Are you there?

A Yes.

Q You say, "beginning in late 2011 and continuing through 2012, F Mar and the bank returned to profitability," right?

A Okay. Yes, it does say that.

Q Now, after the transaction in the first half of 2013 failed, Sandler O'Neill went back to the market in August, right?

A Correct.

Q August 2013, right?

A That is correct.

Q To approximately 24 strategic buyers, right?

A Correct.

Q That was the last widespread marketing effort before this bankruptcy was filed, right?

A That is accurate.
Q When Sandler O'Neill went back to those strategic buyers in the fall in August of 2013, Sandler O'Neill was still holding hope for selling the holding company, right?
A Yes.
Q It was hoping for, to use your words, a silver bullet to save the trumps (sic) and the common equity holders, right?
A That's correct.
Q As a result, Sandler O'Neill did not market the bank, the holding company, or any of their assets for sale pursuant to a Section 363 transaction, right?
A As I mentioned earlier, the first 363 transaction took place in December 2010. Since that time, there'd been just under ten I believe, just round numbers, of 363 transactions, so it's become quite a plethora of transaction for -- to distressed companies. And we know that this is a very efficient market. You've got an industry that is homogeneous industry, on file call reports with the federal regulators, public companies file a 10Q and a 10K with the SEC.

So it's an industry where information travels and can be sorted through very efficiently. So, you know, going out with a marketing process we wanted the buyers, since we're always dictating to investors or buyers what the transaction

may be from time to time, we wanted them to tell us what they thought was going to be the transaction that that particular bank wanted to pursue.

In addition, we had new information at 2013 we just had FNB buy Annapolis Bancorp, and then we just had FNB buy Baltimore County Savings Bank. Now, you've got a brand new player of the market that bought two small community banks on either side of Baltimore, and this bank sits squarely in the middle of that. We thought that that was a positive development for a potential transaction.

Therefore, we were hopeful that FNB could come in, make an offer for the company, keep the capital that the trust preferred represented at the holding company, and then allow them to cut costs to make the company profitable on an earnings run rate basis.

So, yes, we were not going to pigeon hole the institution. We did have conversations. The word bankruptcy came up, the word 363 came up. So what we marketed in a typed written confidential memorandum, no way limited the types of discussions we were having with the potential suitors.

Q In August 2013, Sandler O'Neill did not market the bank or the holding company for sale to strategic buyers through a Section 363 transaction, correct?

A We did not put it in writing suggesting that that was

the transaction we were seeking.
Q A Section 363 transaction would signal to the market that the common equity holders and the trust preferreds at the holding company would be effectively flushed, right?
A That was a concern. As I mentioned earlier, a 363 transaction can produce results for the stakeholders that is less than optimal.
Q And so Sandler O'Neill never went to the market and inform strategic buyers that the company was considering or would even be willing to entertain a transaction that flushed, stripped the trust preferreds and the common equity holders of any value, right?
A I think your point is, did we have dialogue or were we interested in having the dialogue with strategics that would we entertain a 363 transaction; yes, we did have dialogue, National Penn specifically suggested a 363. FNB submitted a letter that insinuated bankruptcy without using the words, the only way you could have completed the transaction that they laid out is only through a bankruptcy transaction. And I think they were just trying to be careful and not trying to pigeon hole themselves in the type of bankruptcy transaction they would otherwise want to pursue.
You remember, this is a competitive process, they're submitting a bid at a bid deadline where they're trying not to get eliminated by something that they may say. So

they're not trying to pigeon hole themselves in how a transaction might be executed.

So we were quite open to having a dialogue about 363. We did have the dialogue about 363, we were just trying to get people to go from talking to a transaction and getting people to actually document an offer that we could take to the board.

Q In reality, Sandler O'Neill was always trying to get potential investors or acquirers away from a 363 transaction, right?

A No.

Q That's not true?

A Not trying to get people away in every instance. We are just merely soliciting people to present their thoughts on paper.

Q Do you recall being deposed in this matter, Mr. Boyan?

A I did.

Q That was just about a week ago, right?

A That's right.

Q It was by me, right?

A Yes.

Q You were under oath, right?

A Correct.

Q Sworn to tell the truth, right?

A Correct.

Q And you agreed to give -- and there was no reason you couldn't give complete and accurate testimony, right?
A Correct.
MR. BROWN: Your Honor, may I approach with his deposition?
THE COURT: Well, for what --
MR. BROWN: To impeach him. I'm sorry, Your Honor, to impeach.
THE COURT: Well, why don't you ask him a -- I mean, what are you going to do, show him his deposition?
MR. BROWN: Sorry, Your Honor, I --
THE COURT: You want to ask him about his testimony at the deposition, I'm not following you?
MR. BROWN: No, I'm sorry, Your Honor. I already asked him whether Sandler O'Neill was always trying to get potential investors or buyers away from a 363. I understood his answer to be no. I made sure that was his answer, and I understood it to be no again, that's inconsistent with his deposition, and so I wanted to clarify that or impeach him, but --
THE WITNESS: Could I address that, Your Honor?
THE COURT: I mean, don't you have to ask him about his deposition testimony before you confront him with what is in the transcript?
MR. BROWN: Your Honor, I was going to ask him the

question, confront him with his deposition testimony to impeach, because what he said on the stand today is different from what he said in his deposition.

THE COURT: All right. You may approach, show the witness his deposition. Has that been marked for identification?

MR. BROWN: It has not, Your Honor. We'll mark it as Committee Exhibit 13.

BY MR. BROWN:

Q Mr. Boyan, this is a copy of your deposition. Let's turn to page 49.

A Okay.

Q Starting on line 9 through line 21. I asked you,

"They suggested a 363. You just tried to get them to bring in value."

Your answer,

"We always tried to get people away from a 363 and say, you know, the reason people wanted to do a 363 is not to have to assume the obligation for the trust preferred, and we never went there. We said no, come through the front door, buy the holding company, take the whole package, so you, Mr. BB&T, you can take that debt, put it on your balance sheet as tier one capital and that accrues to you as a benefit. That's not the way they saw it."

I asked that question, you gave that answer, correct?

MR. O'NEILL: I object, Your Honor. This is improper impeachment. The excerpt he's using refers to a particular transaction, and not -- and doesn't refer to his consistent attitude or approach to the marketing effort.

THE COURT: Overruled. You can answer the question.

THE WITNESS: We, as investment banker for the company are always trying to make sure we do the best we can for the stakeholders.

BY MR. BROWN:

Q Mr. Boyan, my simple question, I asked you that question, you gave that answer at your deposition, correct?

A I did give that answer in my deposition, but everything has context, and you're trying to parse words and pigeon hole me on one answer. We don't -- you know, yes, were we trying to get people not to do a 363, absolutely, right up to the process in the 2013.

In our view, a bank holding company would benefit from taking that trust preferred and putting it on its balance sheet. At that stage, we did not deter people from pursuing a 363 or a prepackaged bankruptcy, and yes, we would've accepted either answer.

Now, in the case of National Penn, National Penn specifically stated that they would only have interest in pursuing the opportunity in a 363 transaction. We met with

them on August 29th of 2013, we brought them into the bank, we spent hours of management's time to try to implore them that this was a franchise worth their interest.

So we pursued National Penn. We pursued them all through the way through August through September, and they said what, they only want to do a 363. Why would we pursue them if we weren't ready to do a 363? We were.

We implored them to give us a letter, they continued to refuse. We went through October, we asked them for a letter, they refused. Got into November, we receive a letter from RKJS, we asked them again, we get the letter, and it says we're going to do a 363, we go to them, and say, you would be our preferred buyer because you are a bank holding company who has capital, and I can see that it would be, you know, probably a better solution for us and maybe we'd get more value if National Penn were to pursue this opportunity in a 363.

So would we prefer that they did a prepack or bought the holding company in a normal M&A transaction, absolutely. Did we fight for our client and the value of their stakeholders, absolutely to the end, because that's what we do.

Now, we did open up the door for a 363 after we received the November 8th term sheet from RKJS, and right before signing it, we sent an e-mail to their advisors

requesting one more time, will you submit us a letter, and they said no.

Q So, Mr. Boyan --

A Can I finish my answer?

Q Mr. Boyan, my --

THE COURT: You opened the door to this, I overruled the objection, let him complete his answer.

THE WITNESS: So they e-mailed back to us, no, go ahead and sign the term sheet, we don't care about the exclusivity, go on your way.

BY MR. BROWN:

Q So that's exactly what I want to talk about, Mr. Boyan. When the RKJS initial proposal comes over, that's November 8th, 2013, right?

A Correct.

Q Now, you do agree that Sandler O'Neill did not shop that RKJS proposal in the market, right?

A That's your term using shop, we did talk to FNB and National Penn about doing a 363 after we received the November 8th term sheet.

Q We're going to talk about that in a minute. You agree in no uncertain terms that Sandler O'Neill did not shop the RKJS proposal in the market, correct?

A Explain what you mean by shop their term sheet.

Q Well, Mr. Boyan, do you not understand what I mean when

I ask you whether Sandler O'Neill shopped the RKJS term sheet in the market?

A No, I do not know if you mean did I hand someone else's term sheet to another potential buyer in violation of the confidentiality agreement, no, we don't do that.

Q Well, let's be clear about that, okay. The company gets a term sheet on November 8th, right?

A Correct.

Q The company is not subject to exclusivity provision starting November 8, right?

A We had an NDA with that party that precluded us from sharing information about one another to third parties.

Q Okay. But the company and its advisors Sandler O'Neill were not subject to an exclusivity provision with respect to the November 8 term sheet that RKJS sent over, correct?

A No, as I just said in my e-mail with this other party saying we are about to enter into an exclusivity agreement that will preclude us from talking to you, so speak now with a letter, with an offer that we can take to our board, and if you do so, it would be considered seriously by the board, and we are encouraging you to do so. And they replied, no thank you, sign the term sheet with that other party, we understand you're going to enter into exclusivity, and you know, good riddance.

Q So that exclusivity provision kicks in when the company

signs the term sheet on November 21, right?

A Correct.

Q During those two weeks, Sandler O'Neill never shopped the RKJS proposal in the market to see if any other market participant, financial investor, or strategic buyer could provide better terms, correct?

A Your term shop is different than my term shop.

So you're asking me forget about how you want to term the question, let's talk about really what happened. Did we call parties to see if we could get a superior proposal from another party prior to signing this term sheet? Yes, we did that. If you want to call that shop, then yes, that's what we did.

But when I think of shop, did we put together a big book, write 363 on it, put together a model, send it out, go out to 25, 35, a hundred parties financial and strategics, no, we didn't do that. We had just done that.

Q Okay.

A We did -- hold it. We did that. We went to every bank we could find that would actually talk to us in the fall of 2013. I mean, when you go back to people five times, they start to say, are you in this business, because you've called me five times and asked me that same question, I've said no five times.

So asking someone a sixth time whether they want to buy

First Mariner, whether it's a 363 or a prepack or anything else, you just don't do it. You go to the people who actually have shown one ounce of interest.

Q Now, the company and its buyers were subject to an exclusivity provision starting November 21, right?

A Yes.

Q That exclusivity provision continued all the way through the company signing the M&A agreement with the RKJS group, right?

A Correct.

Q The RKJS -- excuse me, the M&A agreement with RKJS includes a no shop provision, right?

A Correct, as to every single merger agreement that we sign in an M&A deal.

Q So from November -- the M&A agreement was signed on February 7, right?

A Correct.

Q From November 21 to February 7, the company and its advisors were prohibited, pursuant to that exclusivity provision, from affirmatively seeking a better offer, right?

A You're in this room, because we already talked about we just shopped the company from August to November with zero takers.

Q I just want an answer to my question. The company was subject to an exclusivity provision from November 21 to

February 7, and that meant that it could not seek a better offer than the RKJS proposal, correct?

A We did structure a fiduciary out into the definitive agreement that allowed someone to come in at any point in time in the process and make a superior proposal that could be considered by the board.

So these are -- you enter into a contract, you have to give them some assurance that you're going to adhere to that contract, but as a fiduciary you have to think about what you're giving up by entering into that agreement, and we were cognizant of the fact that we might be limiting our ability to go and talk to others, but we did not close the door on that, and with able help from counsel in the room, we were able to structure a fiduciary out that allowed someone to come in at any point in time, make an offer that we would then be able to consider.

Q The company could consider an offer that came in the door, but the company and its advisors could not affirmatively go and seek a better proposal, correct?

A As again, we went to over 135 parties repeatedly over and over and over and over again, there is only one group, one in four and a half years of attempting one transaction or another that showed the passion, that saw the vision, that saw the value of the franchise offered, and spent their own hard earned money on lawyers, accountants, due

diligence, time, effort, some of these guys quit their jobs and went without pay to pursue this opportunity.

Now, in my world, when someone does that, you've got a bona fide party in which you're dealing with. And when, after all that effort, there's only one party standing, it's pretty easy to figure out, I mean, for me it is, I don't know what you think, but I think one party is pretty easy to figure out.

THE COURT: All right. Let me stop things here for a moment. Mr. Boyan, you're being asked questions -- I understand your desire to answer more fully, but you're being asked questions, you need to answer the question. And, Counsel, I'd like you -- I understand the points that you're making, we need to move on here, or we're going to run out of time, and frankly I'm not sure what this cross-examination is really accomplishing.

MR. BROWN: Very well, Your Honor, I'll move on.

THE WITNESS: Understood, Your Honor, I'll be more to the point.

BY MR. BROWN:

Q Now, Mr. Boyan, the proposed auction procedures here require a bid deadline that is 30 days from today, right?

A Correct.

Q In your opinion, that's sufficient time for a potential bidder to perform their due diligence, right?

A It was what was required in the term sheet and we acquiesced given the circumstances, and we do believe that it is sufficient time for someone who's serious to come to the table and make an offer, conduct their due diligence, and all the rest.

Q The 30 days of due diligence was required by the RKJS group, right?

A The 30-day period to -- in which to make a bid, yes.

Q And in your view, that time is sufficient based on your experience in M&A deals, right?

A Yes.

Q This, you will agree, is not a traditional M&A deal, right?

A It is definitely different, but the process is the same.

Q Now, in -- you testified on direct, or at least I thought I heard you testify on direct that in M&A deals, potential bidders can perform their due diligence in two to three days; is that right?

A That's correct.

Q In those instances, how current was the loan review from the bank that was subject to the auction?

A For example, Virginia Commerce and United Bancshares, that diligence took place Super Bowl weekend last year 2013. They came in at Friday night at 7 o'clock after employees

left, stayed till midnight, reviewing loans, reviewing all the files, financials of the company, regulatory exams, board minutes, and then on Saturday they come back at 7 a.m., and they stay till 11 o'clock. And then on Sunday, they come in and do the same thing, but they leave at 2 o'clock, they feel like they've covered everything, and everybody goes home and gets to watch the Super Bowl.

So essentially that was two days to do due diligence on a $3 billion bank. This -- and the loan portfolios, like two and a half billion. This loan portfolio is 550 million, so in reality, people who understand banks would be able to come in and conduct due diligence in two or three days easily.

Q The total loan portfolio of this bank is 550 million?

A That's approximately it, yeah.

Q Now, you've never offered an opinion on whether 30 days is sufficient for potential bidders to do their due diligence and submit a bit in a 363 auction, right?

A I've never given an opinion.

Q The proposed auction procedures also require a closing deadline of April 30, right?

A That's correct.

Q Okay. So let's walk through the deadline. Bids are due 30 days from today if the bid procedures order is entered today, right?

A That's correct.
Q Bids are due April 7, right?
A That is correct, April 6th actually.
Q April 6th is a Sunday, so I think it's April 7, does that sound right to you?
A April 6th or 7th is fine.
Q The auction is five days later, right?
A Correct.
Q April 11 is the auction?
A That is correct.
Q And the sale hearing is a couple of days after that, right?
A I believe the 14th.
Q April 14th, right?
A Assuming that there are over bidders.
Q Right, if there's an auction, there's a sale hearing on April 14, right?
A Correct.
Q And then the -- in order to be a qualifying bid, any competing bidder must include a closing deadline of April 30 just 16 days after that sale hearing, right?
A Okay.
Q You agree, right?
A Yes.
Q All of the regulatory approvals must be obtained before

a transaction can close, right?
A That's right.
Q And the buyer, whether it's a strategic or a financial investor is the one that has to obtain those regulatory approvals, right?
A That's correct.
Q Now, your hope, Mr. Boyan, is that the regulators would approve an application within 30 days from when it's submitted, right?
A We certainly hope so, yes.
Q So a competing bidder who wins an auction on April 11 and then obtains the right to purchase this asset after a sale hearing on April 14th, only has 16 days to obtain that regulatory approval, right?
A That's correct.
Q And if winning bidder can't get that regulatory approval and close on April 30th, the debtor can terminate the agreement, right?
A That's correct.
Q Now, you agree that a closing deadline of April 30 restricts the number of potential bidders, right?
A Well, we're not looking for moms and pops, we're looking for sophisticated people who can put 80 to $100 million to work and know how to do that.
Q In your view, there's no specific reason that the

closing deadline has to be April 30, as opposed to say 15 days later, right?

A Well, the RKJS in their term sheet came to us, and they said, this is hard and fast, we're not going to move that deadline so it is April 30.

Q So April 30 is imposed by the buyer group here?

A That's correct.

Q Now, you testified on direct, Mr. Boyan, that it would be harmful to the estate here to extend this timeline, either the timeline for bids to be submitted or the timeline for closing; is that correct?

A That's correct.

Q And you said that one of the reasons is private equity firms are fickle, they could walk away, right?

A That's correct.

Q But here we're talking about financial investors who are committed and passionate and loyal to use your words, right?

A I would use that for -- to -- when I talk about Priam, some of the others, I'm not certain.

Q Well, some of the others in the RKJS group are Rob Kunisch and Jack Steil, right?

A Right.

Q And they've been independent consultants to the company for two years before putting this offer on the table, right?

A They terminated their consulting arrangement with the company I believe it was June or July 2013.
Q And they were consultants with the company for two years before that, right?
A Approximately, yes.
Q Now, the other reason you -- another reason you said that extending the deadline would be harmful is because the balance sheet is projected to decrease, right?
A Correct.
Q That's just a projection, right?
A Right.
Q Now, you also said employees or customers may leave, right?
A Correct.
Q Have you spoken to any employees who are planning to leave?
A I've been in the M&A business in the banking sector for 25 years, so United Financial Banking Companies that I just sold to Cardinal Financial closed -- it was announced September 9th and closed in January. By the time, right after we announced the deal, the senior lender, the chief lending officer left to go to a competitor. It happens all the time. That in itself could've killed that transaction and had the buyer walk away.
Q Are you --

A So that is a risk. It is real and tangible, and I've seen it time and time again where employees don't see the opportunity with the other party, and they receive incoming offers from others, and they leave.

Q Okay. But to confirm, you're not aware of any employees who are planning to leave this debtor or this bank, correct?

A They have not shared that with me, no. They don't usually share those sorts of things with us, they just leave.

Q Now, you also testified on direct that the proposed stalking horse bidder fee here is fair and reasonable in your view, right?

A Correct.

Q But as you testified, the stalking horse bidder fee has two components, a break-up fee and an expense reimbursement, right?

A Correct.

Q Now, you've never negotiated a stalking horse bidder fee before, correct?

A No. I have numerous times negotiated break-up fees, though.

Q But never for an auction or a 363 sale in a bankruptcy, right?

A Correct.

Q You don't know what the market rate would be, for example, for a break-up fee or an expense reimbursement for a stalking horse bidder in a 363 sale, correct?
A I have expertise in negotiating break-up fees in transactions and have a tremendous amount of experience in that frankly, and when you look at the grand total of what someone's financial commitment is, the break-up fee, the expense reimbursement are small in comparison to what the overall commitment really is.
Q But to come back to my question, you don't know what the market rate is for a break-up fee or an expense reimbursement provided to a stalking horse bidder pursuant to a Section 363 sale, correct?
A I feel confident that I -- that this one is reasonable.
Q Now, I want to talk about the recapitalization amount. That RKJS group proposes 85 to a hundred million dollars to recapitalize the bank, right?
A Correct.
Q In order to be a qualifying bid, any competing bid must commit to capitalize or recapitalize the bank in the same amount, right?
A They have to get regulatory approval to do so.
Q That's the key, right? All you're wanting here is a bid that will obtain regulatory approval, right?
A That's correct.

Q So why not then get away with -- get away from and eliminate the specific recapitalization amount and merely require that a competing bidder provide evidence or information that their bid will sufficiently capitalize the bank in order to receive regulatory approval?

A I believe in the past we've had some people coming at First Mariner that proposed less in a dollar amount to recapitalize the company, you may be familiar with some of those parties, and we don't want to encourage parties that really don't have the ability to either gain regulatory approval or really don't have the money to come forth and recapitalize this company.

I mean, you have to be a serious sophisticated party to gain regulatory approval and complete the transaction.

Q But the debtor with its advisors can evaluate a bid and determine whether the competing bidder has the financial wherewithal or the capital backing in order to obtain regulatory approval, right?

A Could you repeat the question please?

Q Yeah. The debtor, with its advisors, Sandler O'Neill and yourself, can evaluate competing bidders to determine whether those bidders have the financial wherewithal and the capital backing to obtain regulatory approval, right?

A This was just another term of the arrangements with RKJS. We don't think it's unreasonable, and you know,

there's only so many things you can negotiate before someone walks away from a transaction, and we were very concerned about having this group walk away if we acted obstinate or difficult in the negotiations.

Q The 85 to a hundred million dollar recapitalization requirement was imposed by the RKJS group?

A Yes.

MR. BROWN: Nothing further at this time, Your Honor.

THE COURT: Redirect?

MR. O'NEILL: I just have a couple.

REDIRECT EXAMINATION

BY MR. O'NEILL:

Q First, Mr. Boyan, when Mr. Brown asked you a series of questions about the outside date in the bidding procedures, would you turn to Exhibit 6 -- Exhibit 5 in the exhibit binder? That's the bidding procedures.

Now, you recall that Mr. Brown suggested that the outside date to receive regulatory approval was April 30, 2014; is that right?

A Yeah. Hold on one second.

Q Would you --

A Okay. So 5?

Q Exhibit 5, yes. Would you flip to Section 6(d) on page 4?

A Yes.
Q And read that out loud please.
A "6(d) Closing deadline; the bid shall contain a proposed closing date that is no later than April 30, 2014 or such later date as may be agreed by the debtor after consultation with the committee and the over bidder the closing deadline."
Q How likely is it in your view that if the debtor selects an over bidder as the winning bid it would not agree to extend the closing deadline?
A I think if the -- if we evaluate the terms and don't see any undue risk in the structure of the transaction, I'm sure that they would be flexible in extending that deadline.
Q Mr. Brown just asked you some questions about the 85 to hundred million dollar recapitalization amount.
A Yes.
Q Do you have any understanding as to how the 85 to a hundred million dollar recapitalization number was developed?
A We looked at, you know, it's a billion dollar balance sheet, so kind of simple math. You need at least 75 million. And with this balance sheet, you cannot just get to the minimum.
As I mentioned before, you've got a loan portfolio that has embedded losses in the loan portfolio. You have a

balance sheet that is going to -- is not large enough to carry the expense, so your profit potential is negative. So you're going to have a drain on that capital for some period of time that could be, that could be years before they turn the corner.

So you have to have a certain level of cushion to make sure that you stay above that seven and a half percent threshold, not just at the point of closing, but further out into the future.

MR. O'NEILL: I have no --

Q And do you have any understanding, Mr. Boyan, as to whether regulators require such a cushion?

A A minimum is a minimum. If a regulator is coming in and conducting a regulatory exam and you're right at the minimum, they're going to tell you to raise capital.

MR. O'NEILL: I have no further questions, Your Honor.

THE COURT: Mr. Boyan, I have one question. I'm a little unclear about your testimony on direct.

THE WITNESS: Okay.

THE COURT: And I don't think this was cleared up in any of the subsequent examination.

You indicated that -- I think you indicated that a transaction was announced, I believe you were testifying meaning the RKJS transaction was announced. At what time

was the RKJS transaction announced, and what was announced to the public?

THE WITNESS: Well, it wasn't announced publicly, maybe I used the wrong terminology but it wasn't announced publicly until February 7th, when it was -- when they signed the agreement, the merger agreement.

THE COURT: And --

THE WITNESS: I believe that's accurate.

THE COURT: And what was announced at that time?

THE WITNESS: That RKJS would complete a 363 transaction subject to filing bankruptcy and completing the transaction, the 363 process.

THE COURT: Were the terms, the general terms of the proposed transaction announced at that time?

THE WITNESS: The merger agreement was filed publicly, so yes, everyone would know the terms of the agreement.

THE COURT: I see, all right, thank you.

Do the parties have questions of the witness in light of the Court's questions?

MR. BROWN: No, Your Honor.

MR. O'NEILL: No, Your Honor.

THE COURT: I'm assuming since no one else has approached, that no one wishes to examine the witness. No one else did.

Thank you for your testimony, sir, you may step down.

THE WITNESS: Thank you.

THE COURT: I think we should take a lunch recess at this point. Are you planning to call more witnesses for the debtor?

MR. BRODY: Yes, Your Honor, so we have one more witness we will be calling. I understand that the committee has a witness. Your Honor, I just -- and I appreciate very much Your Honor's flexibility in accommodating my needs, but the way I'm thinking about it, to make sure we try to get finished today, I think we'd like to be finished with the evidentiary record by 4 o'clock at the latest.

So I would suggest if we can to -- if we're going to take a lunch break to keep it relatively brief.

THE COURT: All right. We will take a recess at this point and resume at 2 o'clock sharp.

THE CLERK: All rise. The Court is in recess until 2 p.m.

(Recessed at 1:06 p.m.; reconvened at 2:02 p.m.)

(Call to Court)

THE COURT: Yes, sir.

MR. SIEGEL: Good afternoon, Your Honor, Craig Siegel from Kramer Levin on behalf of the debtor.

THE COURT: Yes.

MR. SIEGEL: And the debtor would like to call its next witness, Mark Keidel.

THE COURT: All right. Please come forward, sir. I need you to stand in front of the witness box, raise your right hand, and take the oath before having a seat.

MARK KEIDEL, WITNESS, SWORN

THE CLERK: Please be seated. Please state your full name and address for the record.

THE WITNESS: My name is Mark Keidel.

THE CLERK: I'm sorry, can you spell that, the last name?

THE WITNESS: K-E-I-D-E-L.

THE CLERK: Thank you.

THE WITNESS: And my address is 6313 Farmington Lane, Woodbine, Maryland.

THE CLERK: And your zip?

THE WITNESS: 21797.

THE CLERK: Thank you.

THE COURT: Counsel?

DIRECT EXAMINATION

BY MR. SIEGEL:

Q Good afternoon, Mr. Keidel.

A Good afternoon.

Q Where do you work?

A First Mariner Bank.

Q And how long have you lived in the area?
A I have lived in the Baltimore area since 1982, I was born and raised in Maryland -- western Maryland.
Q Do you hold any positions at the debtor?
A At the debtor I'm the interim chief executive officer.
Q And have you held any positions at the debtor prior to that?
A Yes, I was chief operating officer from 2009 to 2012, chief financial officer from 2000 to 2009.
Q And have you held any positions at First Mariner Bank?
A Yes, the same positions.
Q Are you on the board of the debtor?
A Yes, I am.
Q How long have you been on the board?
A Since 2009.
Q Now prior to joining First Mariner in 2000 what experience did you have working in the banking industry?
A I started my career in 1982 here in Baltimore. I worked for a bank that was known at that time as the First National Bank of Maryland, which is now part of the M&T system.

In 1987 I joined Carroll County Bank & Trust Company, which is about a $250 million bank located in Westminster. That bank formed a holding company in 1992, I believe. We took that bank public and I became the CFO in

1992. It grew up to about a billion two. We sold that bank in 1999, and I joined First Mariner in 2000.

Q Do you have any college degrees?

A Yes, I do.

Q What degrees?

A I have a B.S. in accounting.

Q From where?

A Boswer State University.

Q Okay. What assets does the debtor have?

A The primary asset at this some point the equity interest it owns in the bank, First Mariner Bank.

Q Does it have any other assets?

A It has some. A small cash account, small investment account, and a receivable that's in escrow related to the sale of its interest in Mariner Finance, which took place several years ago.

Q And what operations and employees does the debtor have?

A The debtor really has no operations. We have named executive officers, myself included and board members, but no operations.

Q And what is the approximate value of the bank's assets today?

A The bank's assets are just under $1 billion.

Q How would you describe the bank's current financial condition generally?

A The bank's condition is troubled. It's current capitalization category is undercapitalized. In the past we've been significantly undercapitalized, so one level below that. We're currently undercapitalized. And the bank has begun to experience operating losses again. We lost money in every quarter of 2013 and we lost more significant amounts in the third and fourth quarter of 2013. So we continue to chip away at the equity of the bank.

Q And just very generally how would you describe the bank's expected financial performance in the near term?

A Well, as was discussed, the bank runs a very significant mortgage operation and that mortgage operation can produce significant swings in revenue, but barring a significant uptick in mortgage banking activities we would expect losses to continue.

Q And how does the bank's financial condition affect the debtor's financial condition?

A Well they're certainly in my mind one in the same as the only operating asset to the degree there's deterioration in the financial condition of the bank, it's going to directly impact the ultimate value of the bank that would be due to the debtor in a sale.

Q How could the bank's current financial condition and its expected future financial performance affect the proposed sale process?

A Well there is a trigger in the merger agreement that does provide for a downward purchase price in the event that tier one equity, as it's defined in the agreement, falls below 29 million. So any dollar below 29 million is a dollar per dollar impact in the purchase price.

Q And are there any other potential effects that the bank's current and future financial condition could have on the proposed sale process?

A Well, I think any time you have a troubled bank you have a variety of potential risks, including the loss of customers over time, if the negative financial condition deteriorates, loss of employees, perhaps some additional regulatory intervention. It's hard to say, and I wouldn't want to speculate on that, but it is a possibility. Again, loss of employees and vendors. Key vendors, our mortgage vendors who buy our mortgages, we sell -- originate and sell anywhere between 50 million and 200 million in mortgages a month, so if those investors would become concerned they could stop buying those mortgages and that would have a significant impact on the mortgage banking line of business.

Q Okay. What are the principal elements of the debtor's capital structure?

A Primarily the trust preferred securities, which total about 50.5 million in face amount. I believe the accrued interest is around 10 million that's currently on the books.

In addition the company has about 19.7 million shares of common stock outstanding.

Q Now is the debtor currently paying interest in connection with the debentures and the trust?

A No, it is not.

Q Why not?

A In 2008 we elected to begin to defer payments on the TruPS that was allowed under the agreement, it's not in the event of default. We also did receive a regulatory letter from the Federal Reserve that prohibited us from making payments, and that letter is still in force.

Q When you say it was allowed under the agreement what agreement are you referring to?

A The agreements that govern the payments of interest on the preferreds. There are a lot of agreements, so I don't remember the particular one.

Q Okay. And for how long has the debtor deferred paying interest in connection with the debentures and the trust?

A Began in December of 2008 and it has continued till today.

Q And what has been the effect of the debtor's decision to defer these interest payments?

A Well no cash payments were made, so cash -- any cash or resources that were at the holding company remained at the holding company or were ultimately downstream to the bank.

Q And what was the effect of not paying that interest in January of 2014?
A Well the interest was due and payable at that point, my recollection is we did have a cure period, so we did trigger an event of default I believe around February 6th, and we did -- we were sued I believe it was in New York Southern District, there was lawsuit filed for demand payment.
Q When you say the interest was due and payable in January do you mean the accrued interest over the past five years?
A Accrued interest and principal at that point.
Q Okay. And you testified that a default occurred as a result?
A Yes.
Q May I ask you to take a look at Debtor's Exhibit 4 in the binder that's before you?
A Yes, I have it.
Q Do you recognize Exhibit 4?
A I do.
Q And what is Exhibit 4?
A It is the complaint filed by one of the creditors. It was filed in New York Southern District.
Q When you say one of the creditors you mean one of the holders of trust?
A Yes.

Q Okay. And who are the lawyers that filed that lawsuit?
A Kirkland & Ellis.
Q Okay.
MR. SIEGEL: Your Honor, we'd like to move Exhibit 4 into evidence.
THE COURT: Any objection?
MR. BROWN: No, Your Honor.
THE COURT: Very well Debtor's 4 is admitted.
(Debtor's Exhibit No. 4 received)
BY MR. SIEGEL:
Q You can put that exhibit away?
A Okay.
Q Mr. Keidel, very generally, what effect did the global credit and financial crisis that began in 2007 affect the bank and the debtor?
A Very generally it was pretty broad, but clearly what we experienced was significant distress in residential real estate. The bank was a significant -- always has been a significant player in the mortgage banking space. The agreements we had with certain of our mortgage investors required us to repurchase certain loans. Those loans went delinquent early in their -- early in their origination, so we were required to repurchase a significant number of loans. Wound up those loans did not perform so we had to take write downs where collateral had to be liquidated. So

that was a significant impact.

We were a significant real estate investor on residential real estate, an originator, so again, as residential real estate customers began to default people's equity got upside down, some customers walked away, some just could not pay, nonetheless when we had to liquidate collateral those were at lower values.

You then had the impact on land development transactions that we had where land development transactions started to go upside down. Again, many borrowers could not pay and the subsequent write downs on collateral were significant.

And then ultimately it spilled over into the consumer and commercial segments where just higher unemployment, distress, and commercial business in general affected customer's ability to pay on those types of loans as well.

Q And how would you describe generally the effect on the debtor's financial -- the debtor's and the bank's financial condition at the time?

A Well it was significant. We were one of the early entrants into the problems, 2007 is when the real residential real estate meltdown occurred, it caused significantly higher levels of non-performing assets for the bank and that precluded us, I believe, from getting any TARP

assistance, so that had a significant impact. And then subsequent to that of course the operating losses that were triggered by declines in collateral values of bad assets eroded capital, and then ultimately when you can't -- when you can't prove that you're profitable for a period of time you have to take valuations against your deferred tax benefits. So all of those things hurt the equity of the bank.

Q How did the bank's regulators respond to those problems?

A Well again, you know, one of the more significant problems was we did not get TARP, and that was a significant blow to the institution. It's not an excuse, but it was a significant event.

In addition, because of the higher level of non-performing asset and the deteriorating capital, we did enter into a cease and desist order in September 2009. Primary components of that agreement were to raise capital and reduce non-performing assets. Those were the two primary provisions.

Q Did the Federal Reserve board take any action in response to --

A They did.

Q -- the problems you described?

A They did. November we signed a similar agreement with

the Federal Reserve to increase capital levels and improve operations.

Q Now in response to the cease and desist order and the agreement with the Federal Reserve board and the problems you described the debtor hired Sandler O'Neill to help recapitalize and market the company, right?

A Correct.

Q And Mr. Boyan testified about the marketing efforts, the recapitalization efforts that the debtor and Sandler O'Neill undertook?

A Correct.

Q All right. Very generally, how would you describe the recapitalization and marketing efforts that you, the bank, the debtor, Sandler O'Neill, undertook over the past four plus years?

A I think they were pretty broad and extensive. We began that in 2009 with hiring Sandler O'Neill, we did complete the sale of our finance company within a year of that, we also completed the secondary offering. Those two items contributed about 21 million to the bank in additional capital.

We also did a debt exchange where certain insiders purchased debt. Some exchanged for common equities. So that helped improve the capital structure at the holding company. And we had hoped that that would create a little

better marketing opportunity in terms of marketing particularly common stock in the bank.

I believe we also attempted a tender offer, I want to say in 2011 on the trust preferred securities.

And then, you know, clearly we had about a four-year period of a variety of transactions either intended to increase capitalization at the holding company over the bank or a sale of the bank.

Q Was there ever a time since October 2009 when you were not actively engaged in trying to market, sell, or recapitalize the bank of the debtor?

A No. I believe there was maybe 60 days when we weren't working on an active, written offer or proposal in four years.

Q And prior to the M&A agreement that's before the Court now none of those efforts succeeded other than the small capital raises you talked about?

A Yeah. Those efforts succeeded to some degree, but they clearly were not enough to overcome the downdraft we had an capital caused by the financial conditions at the time.

Q Now as of the petition date does the bank meet the regulator's minimum capital requirements?

A No.

Q Who's been the primary point person at the debtor and the bank for communicating with the regulators?

A I have been.
Q And how frequently have you communicated with the regulators?
A Beginning with the cease and desist order back to September 2009, we generally have weekly calls with all three regulators, the (indiscernible - 00:16:11) commissioner of financial regulation, the FDIC, and the Federal Reserve Bank of Richmond. There are periods of time when we don't have those calls, but those are usually when the regulators are on cite doing a regular safety and (indiscernible - 00:16:24) examination, we'll suspend those calls. But generally there's either -- they're either on site or we're communicating at least weekly.
Q What could the regulators do if the bank continues to fail to meet the minimum regulatory capital requirements?
A Well in general the regulators have very broad powers.
Again, I wouldn't want to speculate on, you know, what they will do, but they have very broad powers and can intersee (sic) or trigger a receivership under a variety of conditions.
Q Now in November of 2013 the debtor received a proposal from the stalking horse, correct?
A Correct.
Q And what did you and the board do in response to receiving that proposal from the stalking horse bidder?

A Well we certainly received it. I recall, you know, certainly distributing the proposal to the full board, to our advisors. We had a fairly quick board meeting to discuss it. The board directed the advisors to continue to pursue and further negotiate the term sheet.

Q Was the term sheet executed?

A It was negotiated, eventually a term sheet was executed I believe November 21st.

Q And what did you and the board do after the term sheet was executed, generally?

A Generally the board certainly directed me to support diligence efforts, because there was some additional diligence efforts that were required by some of the investors, so we certainly wanted to support that.

In addition the board instructed its advisors to further negotiate the definitive agreement as well as the related bankruptcy provisions. We primarily relied on our advisors to take care of those negotiations.

Q And when was a definitive agreement entered into by the debtor?

A I believe it was February 7th.

Q Now on behalf of the debtor who directly participated in the negotiations with the representatives of the stalking horse bidder over the M&A agreement, the bid procedures, et cetera?

A It was primarily our corporate counsel, which Kilpatrick Stock & Townsend (sic). Certainly Kramer Levin participated in terms of the bankruptcy process and procedures, and Sandler O'Neill also participated.

Q And did you directly participate in the negotiations with the stalking horse bidder over any of the aspects of the M&A agreement, including the bidding procedures?

A Not directly.

Q Okay. And to what extent did your advisors report back to you and the board about the negotiations with the stalking horse bidder?

A My recollection is there's a period of -- in that two-month period there were several meetings, various calls to discuss where we were on the transaction, it was clearly a period of time where one of the investors in the original proposal fell out so we were updating the board on the substitute investor, talked about key provisions, where we were in the process.

So there was a regular dialogue in communications and updates both written and verbal that were presented to the board.

Q And based on what was reported to you how would you describe the negotiations with the stalking horse bidder?

A I'd characterize the feedback that came back to me as spirited, lively, contentious some times, but I think

everybody shared a common goal of getting to a -- getting to a deal and getting the bank recapitalized.

Q Now with the proposed M&A agreement or transaction resolve the bank's unmet capital requirements?

A I believe it will.

Q Do you believe that the contribution of the recapitalization amount, which is provided for in the M&A agreement, provides a benefit to the debtor and to the estate?

A The value of the recapitalization amount?

Q Well, let me restate the question.

A Okay.

Q Do you believe that the contribution of the recapitalization amount provides a benefit to the debtor and to the estate?

A It does. One can't happen without the other. If there's no recapitalization then there's obviously no purchase price to the debtor, so.

Q Did the debtor's board approve the M&A agreement?

A Yes.

Q And when did the board do that?

A We had a board call I believe on February 6th. I think the board gave authorization to its advisors to further negotiate a few pieces and we signed the agreement on the 7th is my recollection.

Q May I ask you to look at Debtor's Exhibit 3, which is in the binder in front of you.
A I have it.
Q And what is -- do you recognize Debtor's Exhibit 3?
A I do.
Q And what is Debtor's Exhibit 3?
A These appear to be the resolutions that were provided to the board and that the board approved.
Q Okay. Did you -- did you sign the resolution?
A I did.
Q Did all the other board members sign the resolution?
A To my knowledge, yes.
Q So it was adopted unanimously?
A Yes.
Q In deciding whether to approve the M&A agreement did the board discuss the terms of the agreement?
A There were discussions. Again, the board received all of the documents. In addition the board received summaries of the key points of the document. At the board meeting on the 6th those documents were discussed in more detail. I do recall, you know, some questions -- maybe not specifically -- but some discussion around certain provisions.
So there was a -- there was significant review and discussion of the materials and the provisions.
Q And in deciding whether or not to approve entering into

the M&A agreement did the -- did the board consider the M&A agreement as a whole and not just its individual terms?

A Yes. You know, we've done a lot of different proposals and transactions, and our experience is that, you know, you never get everything you ask for, everything has to be negotiated.

Were there points in the agreement that weren't ideal? Sure, but at the same time I think the overriding desire and the lack of another transaction to get something done was important to the board. I think the recapitalization was important. The uncertainty surrounded the deferral period extension was a significant concern for the board and potential negative publicity.

So yes, the agreement was looked at as a whole. Certain individual provisions were discussed from time to time and I know were negotiated, but you have to look at this I think as a whole.

Q Are you a creditor of the debtor?

A I am.

Q What is your interest as a creditor of the debtor?

A My face amount is 600,000.

Q And are you aware whether other board members also own TruPS?

A Yes, I believe 8 of the 11 directors own trust preferred securities.

Q And in this resolution, which is Debtor's Exhibit 3, does the resolution accurately describe the reasons why the board decided to enter into the M&A agreement?

A I believe so.

MR. SIEGEL: No further questions at this time, Your Honor.

THE COURT: Cross-examination.

MR. SIEGEL: Oh, I apologize, Your Honor, I forgot to call to Debtor's Exhibit 3 into evidence.

THE COURT: Is there any objection to 3?

MR. BROWN: No, Your Honor.

THE COURT: Very well, Debtor's 3 is admitted.

(Debtor's Exhibit No. 3 received)

THE COURT: Cross-examination of this witness?

MR. BROWN: Yes, Your Honor.

(Pause)

MR. BROWN: Judson Brown for the creditors' committee, Your Honor.

CROSS-EXAMINATION

BY MR. BROWN:

Q Good afternoon, Mr. Keidel.

A How are you? Good to see you again.

Q I want to talk to you about the terms of the RKJS proposal on the table, okay?

A Okay.

Q RKJS as agreed to pay a purchase price for the debtor's equity interest in the bank, right?
A Correct.
Q That purchase price is 4.775 million, right?
A I believe so.
Q Now that price is subject to a potential reduction, right?
A Correct.
Q It will reduce on a dollar for dollar basis for every dollar that the bank's tier one equity amount drops below 29 million, right?
A Right.
Q The purchase price is not subject to an increase, right?
A That's correct.
Q So if the bank's tier one equity amount goes up the purchase price doesn't go it, right?
A That's correct.
Q But if the bank's tier one equity amount drops to 28 million, for example, the purchase price would drop by $1 million, right?
A That's correct.
Q Now you said on direct that the debtor is projecting that its equity is eroding and the tier one capital -- tier one equity amount is dropping, right?

A Correct.
Q Those are projections, right?
A Correct.
Q Now the purchase price here, the ultimate purchase price paid is only below the 4.775 million that RKJS has proposed if there's no competing bid, right?
A Correct.
Q Now if the parties to an ultimate agreement -- an M&A agreement, whether it's RKJS or another competing bidder who wins at auction, if they're ready to close but regulators have not granted approval for the transaction the deal cannot close, right?
A That's correct.
Q But the purchase price is still subject to a reduction, right?
A Under the existing agreement, yes.
Q There's no -- for example, Mr. Keidel, there's no freeze on the downward adjustment in the purchase price if the parties are ready to close they're just merely waiting on the regulators, right?
A That's right.
Q So if the regulators take four months to approve a transaction the purchase price may be zero, right?
A That's possible.
Q Through no fault of the debtor or the winning bidder,

right?
A That's possible.
Q And that was a term imposed by RKJS, right?
A The purchase price adjustment, yes, that was introduced later in the transaction is my recollection.
Q Under the auction procedures here, Mr. Keidel, potential bidders have 30 days to do their due diligence and submit a bid, right?
A That's right.
Q So in those 30 days they've got to review the bank's financial operations, right?
A Yes.
Q That would include reviewing the bank's loan portfolio, right?
A Correct.
Q Were you in the courtroom earlier when Mr. Boyan said that the bank's loan portfolio is about 550 million?
A Yes.
Q Is that correct?
A It's 566- today.
Q Pretty exact. Thank you.
So of that 566- how much is the commercial loan portfolio?
A I don't have the exact number. It's slightly under 300 million is my recollection.

Q It's about 300 million?
A Correct.
Q A little more than half of the entire portfolio?
A Yeah, it's about right.
Q Okay. The commercial loan portfolio was last reviewed by a third party two years ago, right?
A That was my recollection. I believe it was February of 2012.
Q So any competing bidder would certainly need to do diligence and refresh that review of the commercial loan portfolio, right?
A I would think so.
Q Now the RKJS group includes a number of financial investors, right?
A Yes.
Q One of them is Prime Capital, right?
A Yes.
Q Prime Capital has considered and been involved in four potential transactions involving the debtor here, the holding company, and the bank, right?
A Yes.
Q Over the course of the past three plus years?
A Four years.
Q So Prime began doing its due diligence in 2011, right?
A Yes, early 2011.

Q At that time in early 2011 Prime did several months of due diligence, right?
A That's my recollection, yes.
Q About three months or so, right?
A Two to three months, yeah.
Q And then in the next two transactions that Prime Capital considered it did further due diligence, right?
A It did.
Q And then Prime Capital submits a proposal here and the parties sign the term sheet on November 21, right?
A Right.
Q Prime does still more diligence, right?
A Right.
Q Mr. Keidel, if the RKJS group were willing to agree to additional time for a competing bidder to perform due diligence and submit a bid you'd be okay with that wouldn't you?
A It's possible if there's, you know, significant benefit to that competing bid.

I would think in this case, given who might be interested at this point, you know, it's likely to be a sophisticated investment group or a strategic, generally they can do diligence more quickly.

Q So if the -- if the buyer group here were willing to agree to 45 or 60 days for a potential bidder to perform

their due diligence you wouldn't be okay with that?
A I would think we would consider that, yes.
Q The proposed auction procedures here also require a closing deadline of April 30, right?
A Correct.
Q Now the debtor and the competing bidder can agree to a later closing deadline, right?
A Yes.
Q But as currently constituted the auction procedures require a competing bidder to include a closing deadline of April 30 in order to submit a qualifying bid, right?
A Yes, unless the closing date is extended -- can be extended.
Q Unless the debtor agrees to extend it, right?
A Right.
Q The debtor hasn't currently agreed to extend the closing date has it?
A No.
Q So all of the regulatory approvals have to be obtained before a closing can occur, right?
A Yes.
Q A competing bidder at an auction might not know it actually wins the auction until April 14 at a sale hearing, right?
A That's correct.

Q And so that competing bidder then only has 16 days to obtain regulatory approval and close this transactions, right?
A Yes, unless that deadline is extended.
Q Now based on your experience in the industry you anticipate that here it could take 30 to 60 days to obtain regulatory approval, right?
A In what I would consider to be a traditional situation where you have, you know, a healthy institution acquiring another healthy institution, yes.
Q Now, Mr. Keidel, there's no material difference between a closing of -- a closing date of April 30 and May 10th, for example, right?
A No, that -- my understanding of the agreement is that the issue would be, you know, potential further deterioration of the company and the risk that that would cause. Anything that would result in the purchase price reduction, which I think you would trigger the next month's measurement I believe somewhere around May 15. And then of course there's always the risk that the stalking horse bidder, you know, would pull out of the transaction.

But in terms of just the raw financial impact, no, there wouldn't be a material difference until you triggered a new measurement date for the purchase price.
Q Which comes around May 15, right?

A That's my recollection.
Q Now the only material difference between a closing deadline of April 30 and May 30 is the potential financial impact on the purchase price, right?
A That's -- that's the primary. There are other risks and they're similar to the risks I mentioned concerning the board's concern to move the transaction. That's risk of the customer base and some other risks that, you know, loss of key employees. So those are risks there.
Q Okay. So the risks that you identified separate and apart from the downward price adjustment are the loss of customers, vendors, and key employees, right?
A Yes, and I guess you'd have to consider the possibility that the stalking horse bidder would -- would leave the transaction and then you have the risk of non-closure at that point as well.
Q With respect to the loss of customers and vendors do you have any information or indication that any customer or vendor would leave if the closing deadline were extended 30 days?
A I don't have any specific evidence of that. I can tell you that the board and myself are always concerned that, you know, with time there's the potential for an event and a PR event that may trigger more activity in the deposit withdrawal of the company. You don't know what that is.

Q You just don't know do you?
A You don't.
Q And similarly you don't have any evidence or information that any key employees would leave if the closing deadline were extended 30 days?
A I don't have any direct information, but I have a concern.
Q Now, Mr. Keidel, you will agree with me that there's no material difference between a closing deadline of April 30 and June 15, right?
A Again, other than the things that I've mentioned and the concerns that we've mentioned, you know, the other risks, you know, potential regulatory intervention and so forth. It's hard to say, you'd be speculating. But your real issue is the downward purchase price and the other risks that I've talked about, and I do think the longer it takes, my experience has been after four years, time to due diligence can work in your favor, but generally investors find more reasons not to do the deal or to find reasons to back away from the deal.
Q But even if the time to do due diligence is not extended the bid deadline -- excuse me -- the bid deadline remains 30 days from when the bid procedures order is entered, the closing deadline could still be extended to provide a potential competing bidder the knowledge that

they've got more time to obtain regulatory approval, right?
A That would be true, yes.
Q Now if the RKJS group was willing to extend the closing deadline by 30 days, 45 days, would that be acceptable to you?
A I would think so, but I think we would -- we -- certainly if there were not a bid or an auction that took place we would encourage and want to have the quickest possible close we can have, really under any scenario.
Q You want to close quickly but you want to find a -- the highest and best value for the estate, right?
A Correct.
Q And so if extending the closing deadline by 30 or 45 days would maximize bidding activity and attract bidders you would be okay with that, right?
A We would, but we definitely would want to make sure that the bidder was qualified, could receive regulatory approval, and again, was not a threat to the stalking horse walking away from the transaction.
Q And you can evaluate whether a bidder has the financial and regulatory capability to close a transaction based on information they provide in a bid, right?
A Generally, yes. There's no certainty. We would certainly -- I would expect in this type of scenario that if a regulator had concern about a group we'd hear about it.

Q You'd know pretty quick, right?
A I believe so.
Q Now the auction procedures also propose a stalking horse bidder fee that has two components, right? A break-up fee and an expense reimbursement?
A Yes.
Q The stalking horse bidder here is entitled to both of those components if it loses out to a competing bidder at an auction, right?
A That's correct.
Q The break-up fee -- the proposed break-up fee is $1 million, right?
A That's correct.
Q Now of that $1 million, 250,000 is paid by the estate, right?
A Yes.
Q Seven hundred and fifty thousand is paid by the bank, right?
A Yes.
Q But the 750,000 that's paid by the bank that still decreases the value of the estate's equity interest in the bank, right?
MR. SIEGEL: Your Honor, we'd like to object to this line of questioning. I think it goes beyond the scope of the direct. It's really -- he testified he did not

directly participate or have knowledge about the negotiations and the discussions of this. I just think it's beyond the scope of the direct.

THE COURT: Overruled. You can ask the question. You're using up your time to present evidence in support of your own objection case, but go ahead.

MR. BROWN: I -- believe me, Your Honor, I understand.

BY MR. BROWN:

Q Mr. Keidel, the 750,000 that the bank would pay would still decrease the value of the estate's equity interest in the bank, right?

A It's not certain, but you could certainly conclude that.

Q The second component, the expense reimbursement, that's capped at 1.75 million, right?

A Yes.

Q Now this stalking horse bidder fee in aggregate, 2.75 million, that's more than 50 percent of the purchase price for the debtor's equity interest in the bank, right?

A That -- that's correct.

Q The stalking horse bidder fee it's not subject to reduction, right?

A No.

Q Now the board approved this stalking horse bidder fee,

right?
A Correct.
Q The board didn't ask that Sandler O'Neill shop this stalking horse bidder fee in the market did it?
A I don't -- I don't recall a specific line of questioning from the board about the stalking horse fee in and of itself. I do recall the board discussing a variety of the bankruptcy provisions that probably included those, certainly talked about maybe some of the bidding milestones, but I don't remember a specific conversation.

Again, I think the board tried to look at the agreement in totality, certainly listen to the counsel and advice of its advisors, I think considered the amount of negotiation that was done, and what was likely to happen if we continued to prolong negotiations, which we probably weren't going to get anywhere and more time would erode, we could frustrate the bidders. I think all those things were considered.

So I don't know that each individual -- and I can't remember whether the stalking horse bidder fee was a particular issue -- but collectively many of those issues were discussed.
Q Now you would agree with me that a lower stalking horse bidder fee would likely attract more bidders, right?
A It couldn't hurt I wouldn't think.

Q So if RKJS were to agree to a lower stalking horse bidder fee here you'd certainly take that, right?
A I would think so, I'm a creditor.
Q Now the auction procedures here also require a minimum recapitalization amount, right?
A Yes.
Q And the purpose of that so to obtain regulatory approval, right?
A Yes.
Q Now if the buyer group here, RKJS, were willing to drop the requirement for a minimum recapitalization amount and simply require that a competing bidder provide information that it could obtain regulatory approval you'd take that wouldn't you?
A Yeah, it's possible. Again, I think you'd have to consider the circumstances, but you would take that I believe, but that set of circumstances is complex where something less than 85 million would recapitalize the bank, it would likely involve a structure that shrunk the bank or something along those lines that would probably have some additional contingencies.

So in and of itself would that provision maybe benefit, yes, but again, I think we looked at this in totality when we negotiated.

Q Now you do agree with me, Mr. Keidel, it's possible

that a strategic bidder, another bank here, could come in and acquire First Mariner Bank, absorb First Mariner Bank, and not have to infuse any capital directly into First Mariner Bank, right?

A That's my understanding.

Q Now there's also an auction procedure requiring a deposit by any competing bidder, right?

A That's my understanding.

Q And there's three components to that deposit, right? The bid -- the overbid increment of $150,000, right?

A Right. Right.

Q The stalking horse bidder fee of 2.75, right?

A Yes.

Q 2.75 million, I'm sorry. Right?

A Right.

Q And then the outstanding DIP obligations in the amount that the debtor expects to draw on the DIP, right?

A That's my understanding, yes.

Q And the DIP is a $2.5 million DIP, correct?

A Could be.

Q So --

A Depending on what's drawn.

Q -- a competing bidder has to submit a deposit of almost five and a half million dollars when you add those together, right?

A That's correct.
Q That's more than the proposed purchase price for the debtor's equity interest in the bank, right?
A That is correct.
Q The stalking horse here, the RKJS group, they have not made a deposit, right?
A Not to my knowledge.
Q And they're not required under the M&A agreement or the auction procedures to make a deposit, correct?
A Not to my knowledge.

MR. BROWN: Nothing further at this time, Your Honor.

THE COURT: Redirect?

MR. SIEGEL: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. SIEGEL:
Q Mr. Keidel, did you hear the beginning of today's proceedings the deal announced on the DIP that there would be no draw on the DIP?
A I believe -- I believe that was my understanding, yes.
Q Okay.

MR. SIEGEL: No further questions, Your Honor.

THE COURT: I have no questions.

Thank you for your testimony, sir, you may step down.

THE WITNESS: Thank you.

THE COURT: Any further evidence for the debtor?

MR. SIEGEL: No, Your Honor.

THE COURT: All right. Committee, you're up.

MR. BROWN: Thank you, Your Honor.

Your Honor, Judson Brown for the committee. The committee calls Christopher Wu to the stand.

THE COURT: If you'd come forward, sir, I'd ask you to stand, raise your right hand, take the oath before you have a seat in the witness box.

CHRISTOPHER K. WU, WITNESS, SWORN

THE CLERK: Please be seated.

State your full name, spelling you last name, and your address for the record, please.

THE WITNESS: My name is Christopher K. Wu, spelled W-U. My address is 215 West 90th Street, Apartment 7-C, New York, New York 10024.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. BROWN:

Q Mr. Wu, where are you employed?

A The firm of Carl Marks Advisory Group.

Q And what's your position with Carl Marks?

A I'm a partner.

Q What is Carl Marks and your role in this bankruptcy

case?
A Carl Marks has been retained as financial advisor and investment banker to the official unsecured creditors' committee.
Q Now, Mr. Wu, are you prepared to offer opinions today regarding the debtor's proposed auction procedures and the prepetition marketing efforts that occurred before this bankruptcy?
A I am.
Q Before we get to those, Mr. Wu, I want to talk about your background for a little bit.
When did you join Carl Marks?
A In 2003.
Q What is it that you have done for Carl Marks over the last 10 or 11 years?
A Primarily investment banking work, which I specialize in, and particularly with respect to restructuring, working with distressed companies. I do M&A, but the majority of the work is restructuring oriented.
Q And what do you mean when you say restructuring oriented?
A Restructuring means dealing with companies that are undergoing various stages of insolvency both out of court or in bankruptcy.
Q What percentage of your work is restructuring oriented,

Mr. Wu?
A It depends on the year, but I would say probably three quarters on average.
Q Now how many restructuring and bankruptcy -- excuse me -- bankruptcy proceedings have you been involved in?
A Over 50.
Q I'm sorry?
A Over 50.
Q Fifty?
A Yes.
Q And what sort of work have you done in the restructuring and bankruptcy proceedings, Mr. Wu?
A I've represented debtors, I've represented creditors' committees, I've represented secured lenders, DIP lenders, I've represented other parties in interest in various bankruptcy insolvency proceedings.
Q And what sort of matters have you been involved in in working in, what sort of tasks, Mr. Wu?
A I have assisted debtors go through a 363 sale process. I have assisted debtors go through a plan of reorganization process. Bankruptcy is an arena where there's lots of transactions and therefore a lot of the work is transaction oriented. I have helped and assisted creditors maximize value through those proceedings.
Q Mr. Wu, you said you've been involved in Section 363

transactions. How many of those have you been involved in?
A I've been involved in over two dozen Section 363 transactions.
Q And what was your role in those more than two dozen 363 transactions?
A A lot of it was representing debtors, but also creditors' committees, secured lenders, and other parties in interest.
Q Have you ever been involved in negotiating auction procedures for 363 transactions?
A I have.
Q How often?
A I played a role that was integral in negotiating, formulating, and structuring auction procedures in the majority, if not all, of those two dozen Section 363 cases that I've been involved in.
Q Mr. Wu, have you ever testified as an expert?
A Yes.
Q How many times?
A I have testified over 15 to 20 times in that range.
Q Now, Mr. Wu, has your testimony ever been criticized before?
A Not in my opinion.
Q Well has --
THE COURT: I don't know what that question asks

or proves. Let's -- let's stick to something -- is this witness's qualification to testify as an expert questioned by the debtor?

MR. SIEGEL: It depends on the scope on which they're seeking to qualify him, Your Honor.

THE COURT: So offer up something and let's see if there's an objection and let's move on.

MR. BROWN: I will. Your Honor, we would offer Mr. Wu as an expert in auction procedures with experience in auction procedures involving bank holding company bankruptcies.

MR. SIEGEL: I'm not sure quite what that means. I think it's easier just to say what I'm going object to.

I think they're going to have Mr. Wu offer opinions about matters relating to bank M&A, such as what's required for purposes of conducting due diligence, how long it's going to take, and how quickly regulators might act or not act. And I don't think you're going to hear any basis to believe that he has expertise in those matters. But -- and I can do a voir dire if you want or we can handle it on the cross. Probably easier to handle it on the cross, that'll probably be what most of the cross is about.

THE COURT: I'll admit him as an expert to testify as offered, and I'll take the cross-examination as a way to judge how much weight I ought to give his opinions.

MR. BROWN: Thank you, Your Honor.

BY MR. BROWN:

Q Mr. Wu, do you have any experience in Section 363 transactions involving bank holding companies?

A I do.

Q What is -- what is that experience?

A I previously represented the official creditors' committee in the Rogers Bancshare Chapter 11, which closed recently -- or actually it's still pending, but there's a plan on file, and also in the North Texas Bancshares case, which is a Chapter 11 of a bank holding company in the District of Delaware.

Q And what was your role in those two bank holding company bankruptcy matters, Mr. Wu?

A The same as in this matter, which is financial advisor and investment banker to the creditors' committee.

Q Did you testify in those matters, Mr. Wu?

A I did.

Q Did you testify in those matters with respect to auction procedures?

A That was the topic of my testimony in both cases.

Q Now, Mr. Wu, I want to turn to what you did in this case to form your opinions. Can you briefly describe for the Court what you did?

A I have had the opportunity to speak with Sandler

O'Neill, I had the opportunity to speak with the debtor's CEO, Mr. Keidel, I have reviewed information in the data room, including prior board presentations, I've also heard testimony in this courtroom earlier, and I've reviewed the transcripts from the depositions of both Mr. Boyan and Mr. Keidel.

Q Now, Mr. Wu, you testified earlier that you formed some opinions. What are those?

A My opinions are simply twofold.

Number one, that the prepetition marketing process in my opinion was insufficient.

And number two, the bidding protections being proposed here are onerous and in my opinion don't promote bidding.

Q Now I want to start with the first of those, the prepetition marketing. You've been in the courtroom and the Court has heard a lot about that, the prepetition marketing efforts here over a number of years. How was the prepetition marketing insufficient in your view?

A Well certainly it was long and exhaustive, but the period that I'm primarily concerned about is really the three to four to five months leading up to the petition date, and from that perspective I don't believe that the bidders, based on the information that I have and heard, ever marketed a Section 363 sale to both strategic and

financial bidders as a whole.

Q Why is that important, Mr. Wu?

A In my experience it's pretty critical at the point of recognizing that a bankruptcy proceeding is eminent and a possibility as a way to resolve the holding company's debt, and therefore the two factors that are critical, in my view, when the banker assisting the company educate the marketplace specifically letting strategic and financial bidders know that a 363 sale is contemplated, and there's two elements that I think are critical in terms of maximizing value in that particular transaction.

One is that bidders will then know that the bank, after all this time, can be sold free and clear of the TruPS. In other words the board is prepared, management is prepared to sell the stock in the bank holding company and possibly impair the TruPS holders and seven pair equity, and that's a very important signal to buyers who have been presented with various types of transactions in the past, all of which we're seeking, and again, there's no -- there's really no fault in First Mariner's efforts to cover the TruPS and the equity, but that -- that didn't intersect with value and that didn't result in a transaction. So buyers need to understand, oh, I can buy this asset finally free and clear. That's number one.

The other critical point, in my opinion and

experience, is that bidders can then be incented to come to the table with bid protections.

Q And why is that important?

A That's important because in a bankruptcy context a stalking horse is then exposed as the floor, and so in exchange for the time and energy to agree to serve as a floor and a platform that encourages bidding stalking horses are conveyed value through bidding protections.

And so those are important incentives to get strategic bidders to the table, in particular certainly who are not interested in participating in part of a club of a recapitalization or a financially driven Section 363. So those are my opinions.

Q Now, Mr. Wu, you heard that RKJS submitted a term sheet, a proposed term sheet on November 8 and a term sheet was executed on November 21. Sandler O'Neill discussed the proposed terms with two strategic buyers but did not shop that proposal in the market. Did you hear that testimony?

A I did.

Q In your view was that sufficient marketing of the RKJS proposal?

A Well the testimony I heard even from Mr. Boyan's perspective, and I'm not here to characterize it, but I don't think he felt that it was shopped either, in that he had specifically reached out to two strategic buyers to see

if they were interested.

My view is that in order to appropriately shop at the point of entering into an important transaction that this bank has been seeking for over four years and wherein they would be locked up with proposed bid procedures that they need to make sure that this is the best stalking horse transaction they can enter into that will promote bidding.

And in my mind going to two buyers is insufficient and it's akin to, you know, letting a couple of bidders know I'm going down the aisle even though, you know, they're on the brink of a transaction.

Q Now, Mr. Wu, you said you had a second opinion with respect to the auction procedures that have been proposed here; is that right?

A Yes.

Q What is that opinion?

A That the bidding protection -- bidder protections as a whole are onerous and don't promote overbidding.

Q Are there any particular terms in your view that are onerous and don't promote overbidding?

A Specifically the expense reimbursement of 1.75 million and the break-up fee of 1 million.

Q Are there any other terms of the auction procedures that would chill bidding in your view?

A The recap requirement is certainly one, and also the

outside closing date is very short, as well as the bid deadline.

Q So you mention the break-up fee, the expense reimbursement, the recapitalization amount, the bid deadline, and the outside closing date. I want to talk about each of those, okay? And let's start with the break-up fee.

In your opinion, Mr. Wu, why is the break-up fee not designed to maximize the number of bidders here?

A In my opinion a break-up fee should (a), obviously compensate a stalking horse for its desire to move forward to capture some value that they're adding to the estate. Really that encouraged bidder 1 million on 4.775 purchase price is too high a percentage, it represents over 20 percent, and taken in and of itself is an extraordinarily percentage of the purchase price, in my experience.

Q What -- well, Mr. Wu, you are taking the break-up fee as a percentage of the purchase price for the debtor's equity and not considering the recapitalization amount infused into the bank, right?

A Yes.

Q Why?

A Because the estate and its creditors get no value and there's no distribution to the creditors for any amount of the recap amount whether it's 85 or 75 or a strategic comes

in and recapitalizes the bank's subsidiary.
Q Now was there a break-up fee given to a stalking horse bidder in either of the other two bank holding company bankruptcies you've been involved in?
A There was.
Q And what -- in both or in just one?
A In both Rogers and North Texas there was a break-up fee in both.
Q And how does the break-up fee in those bank holding company cases compare to the break-up fee here?
A The break-up fee in the Rogers Bancshare case was 4 percent of the purchase price, $640,000 on a $16 million stalking horse price.

In the North Texas case the break-up fee was $250,000 on a $7.35 million purchase price.
Q Why is the break-up fee here -- the proposed break-up fee, $1 million, why that problematic in your view?
A It's a problem because over bidders are going to be -- and we're not even getting to the expense reimbursement yet -- but over bidders are always going to be $1 million more, they're going to have to pay $1 million more at every successive round of bidding, assuming that we even get a single overbid, and so when buyers look at taken together the bidding protections there's a judgment there as to whether, you know, they can really compete.

Q Now in your opinion, Mr. Wu, what is an appropriate break-up fee here to compensate the stalking horse but still designed to maximize the number of bidders?

A In my opinion the break-up fee should be approximately $125,000.

Q What do you base that on?

A In any view a break-up fee should range in the two to four percent range based on my experience, that's typically, you know, where they are in 363's, and I think that would be appropriate in this case.

Q You also mentioned that you have a problem with the proposed expense reimbursement; is that right?

A Yes.

Q What's the problem there, Mr. Wu?

A Well the problem is 1.75 million again as a percentage of the purchase price, 4.775, is extremely high, and I believe it's over 35 percent and it functions in a similarly bid chilling manner when they're so far above norms that we see in other cases that taken together 35 percent and over 20 percent for the break-up fee you're looking at 56 or 57 percent of the purchase price as a hurdle, and therefore the next over bidder has to bid 2.75 million plus another 150-initial bid increment required and that will require almost $8 million for the next over bidder to overbid the 4.775 floor set by RKJS.

Q Mr. Wu, do you have a view on what an appropriate expense reimbursement cap would be?
A I do, it's 250,000.
Q Mr. Wu, you said the -- the timeline here, the closing deadline and the bid deadline do not maximize the number of bidders here. Why is that your opinion?
A It's my opinion because there are a lot of things that an over bidder needs to do upon the notice of bid procedures where whatever is decided here today bidders can react to, and we certainly are encouraged that the debtor, with our input, opened up exclusivity late last week or -- yeah, two days -- two, three business days ago, but -- but there still needs to be a full vetting of the marketplace and just signing confidentiality agreements, getting into the data room, spending time with management, if management is tied up with one party, you know, it obviously needs to multi-stream many parties' interests hopefully. So it's a pretty rapid timeline. Not to say that some extremely sophisticated parties couldn't meet it, but it's -- it puts more pressure, let's just put it that way, on an over bidder.
Q In your view what should the due diligence time period be and thus the bid deadline?
A I believe ideally it would be 30 days beyond what is proposed to give a fulsome 60 days from what is, you know,

from the bid procedures hearing for the bid deadline.
Q You also mentioned an issue with the closing deadline. What's the problem with the proposed closing deadline, Mr. Wu?
A The proposed closing deadline effectively requires, as we heard earlier today, that a bidder needs to achieve regulatory approval 14 days after the sale hearing, and that's yet another hurdle for an over bidder to submit its bid, get approval, and really the issue is the signal to the marketplace that a strategic bidder needs to obtain regulatory approval effectively within 53 days, I believe, which is much more rapid than the other cases that I've been involved in.
Q Well what -- what was the outside closing date in the other -- the proposed outside closing date in the other bank holding company bankruptcies you've been involved in, Mr. Wu?
A So in the Rogers case where the bid deadline was also fairly expedited, but -- and I believe it was 33 days -- the good news was that the outside closing date was approximately, I believe, and I don't have the exact numbers, but around 123 days.
Q What about in North Texas?
A In North Texas the -- the debtor filed its petition similar to First Mariner with a stalking horse under an

exclusivity provision, which thankfully was lifted very soon after the petition, six days.

So as a consequence, if you include the time from when exclusivity was lifted, the debtors in that case were able to market the assets for approximately a month before the bid deadline, and therefore the bid deadline -- before the bidding procedures hearing -- and therefore the bidding -- bid deadline actually was pretty rapid, inside of I believe it was December 9, 22, so around 17 days. So I would add approximately 30 days to that. So around 44, 45 days was the time that over bidders could do their due diligence and submit bids. And from the time of the bid procedures hearing until closing the outside closing date was 70 days.

Q Now you've been in the courtroom today, you've heard testimony that the debtors can extend the closing deadline beyond April 30. Do you recall that testimony?

A Yes.

Q Is that sufficient in your mind, Mr. Wu, to alleviate any concerns that an April 30 closing deadline will chill bidding activity?

A I think it's very helpful that there's flexibility that a debtor can use its business judgment, and you know, extend it, but that's certainly not in a bidder's control. Bidders obviously will look at timelines, its own resources, and

determine whether pursuing and participating in this auction is worth their while. And so that's just another factor where they're going to have to use their judgment to say, can we be influential or through no fault of our own we really do all of our work and the debtor still closes, or the stalking horse, which is a possibility, it just -- it just doesn't know. An over bidder has no way of knowing. So it's a factor.

Q Mr. Wu, you also mentioned an issue with the recapitalization amount. What's the problem with the required recapitalization?

A So the main issue is simply that a strategic can allocate capital on its own balance sheet, a strategic with a tier one capital ratio of 7 or 8 or 9 or whatever it may be doesn't actually need to stroke that check of $85 million in order to gain regulatory compliance. You may need to allocate a certain amount of money, you may not need to, it's -- it's really up to the regulator.

So it goes to simply in my opinion what would maximize value is a provision that's simply stated to not have that requirement but to simply gain regulatory approval.

Q What is the impact in your opinion of including a requirement that a competing bid itself include a recapitalization amount?

A In my opinion that's just another factor for over bidders evaluating the bidding procedures to determine whether this is a process they can get involved in, and to the extent that that capital is available for a strategic bidder so that it could in fact advance it and maybe take it back post-closing I'm not sure that every strategic bidder can do that.

MR. BROWN: Nothing further at this time, Your Honor.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. O'NEILL:

Q Hello, Mr. Wu.

A Hello.

Q Mr. Wu, if I want to bid on this company I have to come up with more than $8 million in cash that goes to the holding company don't I?

A It depends on cash. I mean in you're a strategic bidder, like I said, you can allocate value on your balance sheet, you might not have to stroke that check.

Q Well, if I'm a financial bidder I've got to come up not just $8 million for the holding company, right?

A Correct.

Q I've got to come up with 85- to $100 million for the bank, right?

A Yes, if you're a financial investor, yes.
Q So that's an aggregate commitment of $103 million, right?
A You're talking about 8 million plus 95- or --
Q Actually I take it back, maximum, let's say 85-, so let's say it's an aggregate commitment of 93 million; right?
A Yeah. Yes.
Q And as a percentage of $93 million, $2.9 million is 3 to 4 percent; is that right?
A Something like that.
Q Okay. Now strategics, a bank, right, that has to -- doesn't allocate its capital willy-nilly, right?
A Right.
Q So if they have capital on their balance sheet they can't just -- they don't faultlessly allocate it to one project or another, right?
A Sure, but a bank may have significant excess capital.
Q But they're still allocating the capital aren't they?
A We don't know exactly what kind of allocation. It's subjective. It's all based on what a regulator will approve or not approve. But yes, capital needs to get allocated.
Q Presumably the regulators are fairly careful to make sure that capital is actually allocated aren't they?
A Presumably, it depends on the merger structure.
Q And even in that instance the combination of the cash

for the holding company plus an allocation of capital, let's say lowest instance $85 million allocation, that's still $93 million either paid and allocated isn't it?

A If that numbers correct. I think there's some subjectivity to that number.

Q Mr. Wu, you've run one bank M&A process in your career; isn't that right?

A Yes.

Q Just one?

A One M&A process with the insolvency overlay for a community bank, yes.

Q And you heard Mr. Boyan testify earlier, right?

A Yes, I did.

Q And he's -- he's closed more than 50 bank M&A transactions, right?

A I heard a range of 35 to 70.

Q Okay. But you've only run one?

A Correct.

Q And you did that last year, right?

A Last year.

Q For a community bank?

A Yes.

Q And they retained Carl Marks as an financial advisor?

A Yes.

Q And you provided advice to the board on strategic

alternatives?
A I did.
Q And they decided to go with a 363 sale, right?
A That was the direction that we focused on ultimately.
Q And you actually conducted -- you ran a 363 process for that community bank, right?
A Well, prepetition 363 process in order to select the best stalking horse, yes.
Q And you designed that 363 process, right?
A Myself and my colleagues provided advice to the board and the board approved it.
Q And you went out with a 363, the way you've told us should have been done here, you went out expressly seeking a 363, right?
A Yes.
Q Okay. And you marketed it to over 125 investors?
A Yep.
Q Strategic and financial?
A Yes.
Q And you got two indications of interest, right?
A Ultimately, yes.
Q All right. And then you -- then they got in and they did some due diligence, right?
A Yes.
Q And what happened?

A They were concerned about the bank's financial situation, there weren't adequate reserves, there were significant marks that a buyer would need to take, and they ultimately disengaged for a variety of reasons after they did their due diligence.

Q So -- so neither party submitted a bid?

A Right, and --

Q So --

A -- I think they ultimately had other projects to pursue that were more attractive.

Q So the sale process failed?

A The sale -- we fulfilled our scope, the board asked us to go out and find a stalking horse, and ultimately it was concluded. We certainly fulfilled the scope and we didn't achieve the objective and the goals. So I wouldn't say it failed, we just weren't able to, through no fault of our own, secure a stalking horse.

Q So you didn't secure a stalking horse and after that you and the community bank had a mutual parting of the ways?

A Very mutual, and different community banks obviously have different financial conditions, some worse than others.

Q All right. Okay. And other than that unsuccessful process for the community bank you've never run an M&A process for a bank or a bank holding company?

A No.

Q And other than that unsuccessful process for the community bank you've never organized a data room on behalf of a bank holding company?
A No, And it's going to be no to all of these question. The focus really is my experience as in bankruptcy in 363 sales.
Q Maybe we should change seats.
And other than your unsuccessful process with the community bank you've never communicated with potential purchasers on behalf of a bank or bank holding company?
A I've communicated them, but the protocol if I'm serving as a financial advisor to the unsecured creditors' committee is for the debtors to do that.
Q Okay.
A So I have communicated, but the sale process protocol is the debtor's role.
Q All right. You've never represented a potential purchaser of a bank or a bank holding company either, right?
A No.
Q And you've never assisted a potential purchaser of a bank or bank holding company in conducting due diligence?
A No.
Q And you've never represented a potential purchaser of a bank or bank holding company in formulating a bid?
A Correct.

Q You've never published any articles concerning banks or bank holding companies?
A I have not.
Q And you don't belong to any bank or bank holding company trade or professional organizations?
A No.
Q Now I think you said that other than your experience with the community bank your experience in the area of bank and bank holdings companies arises from the Rogers Bancshares and North Texas cases; is that right?
A Yes.
Q And those were both bank holding company bankruptcies?
A Correct.
Q Right? And you represented the unsecured creditors' committee in those cases?
A Yes.
Q Rogers Bancshares was last summer, right?
A Last summer, yes.
Q In Arkansas; is that right?
A Yes.
Q And as FA for the committee there you didn't manage the bank's due diligence process?
A No.
Q That's not typically the committees' role, right?
A No.

Q That's what you were saying before?
A Correct.
Q It's really the debtor's role?
A Yes.
Q So the FA for the committee doesn't really have much to do with that; is that right?
A No, but it's -- you know, we need to evaluate the data room and ask for further information if we think more is warranted or valid.
Q Okay. And you had some communications with bidders, right?
A Some, yeah.
Q But the protocol that you guys had agreed to in that case was that communications concerning the sale process would run through the debtor's FA, right?
A That's right.
Q I mean that's just the way things are done, right?
A Typically, yes.
Q And you think that's appropriate, right?
A Typically, yes.
Q Okay. And in -- as the FA for the committee and Rogers Bancshares it wasn't your role to communicate with regulators either, right?
A No.
Q Again, that's the role of the committee -- of the

debtor, excuse me?
A The role of the debtor, yes.
Q And you were also the committee FA in North Texas, right?
A Yes.
Q And if I asked you the same questions about North Texas I'd get the same answers?
A You'd get all the same answers, yes.
Q In fact in your deposition we looked at some of your time records from North Texas, right?
A You did.
Q Uh-huh. And there were records from the filing from your retention through the auction, right?
A Yes.
Q And you had recorded I think one hour of time talking to a potential bidder; is that right?
A Yes, and that was in the North Texas case, yes.
Q And zero hours relating to due diligence?
A Yes, but my colleagues were probably more involved in that.
Q Okay. But you --
A Not me, no.
Q And -- and zero committee -- communicating with regulators, right?
A Zero, yes.

Q Okay. There are investment banking firms in the country that are widely considered to be experts in the field of banks and bank holding companies aren't there?
A Yes.
Q And Sandler O'Neill is one of them?
A Yes, Sandler is one of them and their expertise is in capital raising and healthy M&A.
Q Okay. And when you represented the community bank you didn't deal with regulators, right?
A No, that was really the CEO and the CFO's role.
Q Okay. But you didn't speak to them, the regulators?
A I personally did not speak to the regulator.
Q And you haven't ever worked for a bank regulator?
A No.
Q And you've never represented a potential purchaser of a bank or bank holding company in obtaining regulatory approval?
A No.
Q And so you have no personal experience in obtaining regulatory approval for a purchaser of a bank or a bank holding company?
A I have not done that.
Q And on direct you offered some opinions about the potential timing of regulatory approval --
A Yes.

Q -- of a purchaser, right?
A Yes.
Q That was based on your experience only in Rogers and North Texas?
A Right, and so there's been ten cases approximately of bank holding companies, and I participated in two of those, which is significant, and I base my views having been an active participant in those two cases.
Q But you didn't talk to any regulators in Rogers and North Texas?
A No.
Q And in fact your understanding of the regulatory approval process and Rogers in North Texas was based on your conversations with regulatory counsel; isn't that right?
A Regulatory counsel, debtors, and our own counsel, who is more knowledgeable.

So clearly, you know, I'm not a regulatory expert, I have some exposure to it and have participated in M&A processes where regulatory approval is needed. So I have some experience.

MR. O'NEILL: And, Your Honor, I have some binders with exhibits for cross, can I approach?

THE COURT: Yes.

BY MR. O'NEILL:
Q Would you take a look at tab 4 in the binder? That's a

copy of your declaration is it not?
A Yes.
Q Would you flip to paragraph 30?
A Yes.
Q In paragraph 30 you offer opinions about the amount of work that's required to -- for bidders to perform due diligence and prepare binding bids, right?
A Yes.
Q And then in paragraph 31 you state:
"Given the complex nature of bank transactions the approximately 30-day time frame for competing bidders to conduct due diligence and submit a bid is extraordinarily truncated and likely will discourage bidders and chill bidding."
Right?
A Yes.
Q And the experience on which you base these opinions is your experience in the community bank case, right, and Rogers and North Texas?
A Yes.
Q Okay. There was no auction -- well, strike that.
And then turning to paragraph 3 -- 33 rather it says:
"In my experience and for the reasons stated above an appropriate period for conducting due diligence and

preparing bid packages in connection with the transactions involving stock and the bank should run at least 60 days from approval of bid procedures to fall within a realistic regulatory approval time frame."

Do you see that?

A Yes.

Q And the basis on which you assert that is again the two community banking 363's in which on over bidder participated in that auction, right? That's Rogers and North Texas in your view?

A Yes.

Q By the way, Rogers and North Texas were not the only bank holding companies in which there was an auction; isn't that right?

A No. I mean that's correct. That's correct.

Q There were in fact two others, right?

A There were two others, yes.

Q I think Big Sandy, right?

A Yeah.

Q And Mercantile?

A Right.

Q All right. Let's talk about Rogers. You testified concerning the bid procedures in Rogers, right?

A I did.

Q And among the things you testified about was the length

of the period between the bid procedures order and the bid deadline, right?

A Yes. There's a lot of things that we -- that I testified on, but among the things was timing.

Q Okay. But you thought that period was too short, right?

A I did.

Q And the period was about 35 days; is that right?

A Yes.

Q Okay. And you said it was too short because there's a lot to do, right?

A Yeah.

Q You have to sign an NDA?

A Right.

Q Do your diligence?

A Yes.

Q Get internal approvals?

A Yes.

Q Hire consultants?

A Yes.

Q Meet with management. Mark up a purchase agreement?

A Yes.

Q And get regulatory approval, right?

A Yes.

Q And you testified that a buyer couldn't reasonably do

that in 33 to 35 days, right?
A Yes.
Q And I think your words were that to the extent that I was a third-party bidder and I saw that I had 33 to 35 days to do this I wouldn't even bother; is that right?
A I said that there was a key factor, which was that they had been clearly working with a lot of strategics extensively discussing 363's, but in any case there was a bidder in the courtroom who was ready to go but for the bid showing terms. So those were positive factors which I didn't know.
Q All right. But you thought a lot more time was required, right?
A I did.
Q And you told the Court 120 days from the bid procedures order to the bid deadline?
A Yes.
Q Right? And then -- and you said that that was sort of necessary for the post-petition process to be adequate, right?
A Ideal and adequate, yes.
Q Well but you didn't use the word ideal, right, you used the word adequate?
A Adequate, yes.
Q But you're not asking for 120 days here?

A No.
Q And part of the reason for that is that you're concerned that First Mariner's tier one capital is declining, right?
A I mean there's a trade off in the Rogers case that the bank was certainly performing better, had tier one capital in the six percent range, and so this -- First Mariner's capital ratios are worse and so there's some consideration to that.
Q But a declining tier one capital ratio justifies a shorter bidder period doesn't it?
A To some extent, yes.
Q Now the court in Rogers didn't actually adopt your view about a 120-day bidding period did it?
A No.
Q In fact it adopted the debtor's view, right?
A Yes.
Q Thirty-three days?
A Yes.
Q And during that -- notwithstanding the fact that there was only 33 days a competing bidder was able to complete due diligence, right?
A Yes.
Q And to submit a binding proposal?
A No, two were, although we certainly hoped that two

others would have been able to perform, but there was certainly a sense and understanding that management was stressed in terms of managing due diligence for four separate parties at the same time. So you know, had it been longer I think there was a strong possibility that there could have been more bidders in Rogers. But that being said, management was able to support the process for two significant over bidders.

Q Nevertheless in 33 days two parties completed due diligence and committed topping bids, right?

A Yes.

Q And there was an auction, right?

A There was.

Q And the purchase price went from 16- to over 50-, right?

A The closing price was 53.6 million, which was a 300 -- yeah, a 330 percent premium over the stalking horse price. Thankfully, you know, we were able to reduce the bid protections by over 80 percent, which was a key factor, in my opinion, in promoting that auction.

Q And by the way, there was a no shop in Rogers, right?

A Yes.

Q And it restricted both pre and post-petition marketing?

A It did.

Q And 33 days were still enough to get two competing

bids, right?
A In that particular case it was, yes.
Q Let's talk about some of the other bank holding company cases.
Under the bid order in Capital there were 23 days between the bid procedures order and the bid deadline, right?
A Right, but in Capital Bank Corp., as I understand it, there was no stalking horse.
Q You understand that from counsel; is that right?
A I know that much about that case.
Q Okay. Your counsel was also counsel in that case, right?
A Actually I never talked to Mr. Seligman about Capital Bank Corp.
Q Anyhow there were 23 days between the bid procedures order and the bid deadline in Capital Bank Corp, right?
A There was, and no over bidder showed up as I understand it.
Q And under the bid procedures order in Mercantile there were 33 days between the entry of the bid procedures order and the bid deadline?
A I assume that's correct.
Q Okay. And there was an auction in Mercantile, right?
A Yes.

Q There was an over bidder?
A Yes, as I understand it.
Q Even though there were only 33 days between the bid procedures order and the bid deadline?
A Right, there could have been more.
Q And in first place there were actually 13 days between the entry of the bid procedures order and the bid deadline, right?
A I assume that's correct. But no over bidder showed up in that process.
Q Okay. I mean at your deposition you actually looked at the order, so -- and you agreed with me, right?
A Yes, you showed that -- that to me.
Q And under the bid procedures order in Big Sandy there were 32 days between the entry of the bid procedures order and the bid deadline, right?
A I assume that's correct.
Q And there was an over bidder in Big Sandy, right?
A Yes.
Q And under the bid procedures order in America West there were 27 days between the entry of the bid procedures order and the bid deadline, right?
A I assume that's correct, even though no over bidder showed up in that case.
Q Turn to paragraph 34 of your declaration, and the

second sentence, please. Do you see where it says, "Banks are valued based on their capital"?
A Yes.
Q That's your view, right?
A Yes.
Q And what you mean by that is banks are based on the book value of their -- of their equity, right?
A Yes.
Q And all things -- all other things being equal if the bank's capital increases the value of its equity increases, right?
A All other things being equal, yes.
Q Okay. A recapitalization of the bank, whether through capital infusion or a merger with a strategic acquirer, is a necessary requirement to obtain regulatory approval for this transaction, right?
A I agree with that.
Q So a recapitalization of the bank, whether through a cash infusion or a merger with a strategic acquirer, is a necessary predicate for this transaction, correct?
A Yes. Yes.
Q On direct you testified that a strategic bidder might be deterred by the April 30 closing deadline; is that right?
A Yes.
Q You thought that the gap between the auction and the

April 30 deadline was potentially too short for a strategic to get regulatory approval, right?

A Yes.

Q Or to have comfort that it would get regulatory approval, right?

A Yes.

Q But strategics are by definition other banks, right?

A Yes.

Q So they have lots of contact with the regulators, right?

A They should, yes.

Q And they've already received regulatory approval for their businesses haven't they?

A For their existing business. A merger is completely different.

Q All right. I'd like to go back to where we started, that community bank. That community bank was a holding company -- or had a holding company, right?

A Yes.

Q And the holding company had issued trusts -- TruPS?

A Yes.

Q And the holding company was not in good financial condition was it?

A No.

Q It had negative equity?

A Yes.
Q And it had -- the bank had significant non-performing assets, right?
A Yes.
Q And at the time you were marketing it it wasn't making any money, correct?
A Correct.
Q It sounds kind of familiar doesn't it?
A What's the -- what is the point?
Q All right, never mind.
And the bank --
A That bank is not this bank. This is a different circumstance.
Q All right. And the bank -- that bank considered a variety of transactions, right?
A Yes.
Q And you tried as hard as you could to sell it, right?
A Yes.
Q You designed the process as best you could, right?
A Sometimes the asset doesn't have the value. In this case we're very thankful that there's value.
Q That's right. So you designed a gold-plated 363 process in your mind, right?
A No, I think that's the way it should be done.
Q Right. And you provided everybody with all the

information they're required?
A Yes.
Q And you still didn't get a bid, right?
A That happens in M&A, you should ask Mr. Boyan as well.
Q I think Mr. Boyan tried for four years and he finally got a bid, right?
A It really depends on the case.
Q And rather than the bank having nothing it's better to hang onto the deal we have; isn't it?
A In that specific case, yes. But the key is at the point of going into bankruptcy did you -- did the debtor look at -- did they market check that to make sure that before being locked up under these bid protections did they have the best stalking horse, did they have the right bid protections?
Q Having --
A That's the key.
Q Having spent over four years trying to find a transaction and finally having a buyer --
A In my --
Q -- the last thing this bank should do is let the stalking horse get away?
A And my opinion is, and I agree, we don't want the stalking horse to get away and they should stay in this room and they have a binding agreement like all stalking horses

do, and if they breach that binding agreement it'll be like any other Chapter 11 case.

My main concern is the -- not the first 44 months, but the last 4, the last 3.

MR. O'NEILL: I have no further questions, Your Honor.

THE COURT: Redirect?

MR. BROWN: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. BROWN:

Q Mr. Wu, you were asked on cross-examination a number of questions about an engagement you had with another community bank, rights?

A Yes.

Q Concerning a -- marketing a 363 transaction, right?

A Yes.

Q And you testified that the circumstances there were different from the circumstances here, right?

A They are.

Q How so?

A That bank did not ultimately have any value for the TruPS, and if there was value the bidders had more interesting better projects to devote its attention to. That was my conclusion.

Q Now, Mr. Wu, on cross-examination you also discussed

several other bank holding company bankruptcies cases besides North Texas and Rogers, right?

A Yes.

Q In three of those, Capital, First Place, and America West you said there was no over bidder; is that right?

A Yes.

Q Are the auction procedures in those cases informative on what auction procedures should be used to attract the maximum number of bidders?

A Clearly, I mean the fact that no over bidders showed up is unfortunate, and part of that may have something to do with the bid procedures and auction procedures, but I'd have to look at those cases more carefully. All we can say is that the result was there was no auction in those cases.

Q And you also discussed two cases in which there were auctions, Mercantile and Big Sandy, right?

A Yes.

Q Now in any of these five cases was the outside closing deadline as short as the outside closing deadline proposed in these auction procedures?

A My understanding is that the auction outside closing date in this case is more rapid than any of those other cases.

MR. BROWN: Nothing further, Your Honor.

MR. O'NEILL: I have nothing, Your Honor.

THE COURT: I have no questions for the witness.

Sir, thank you for your testimony, you may step down.

Any other evidence for the committee?

MR. BROWN: Nothing further, Your Honor.

THE COURT: All right. Anyone else wishing to present any evidence or be heard prior to closing argument?

MR. O'NEILL: Your Honor, can we take a five-minute break?

THE COURT: That sounds like a good idea. Five minutes.

THE CLERK: All rise. This court is in recess.

(Recessed at 3:44 p.m.; reconvened at 3:53 p.m.)

(Call to Court)

THE COURT: We're ready for closing argument?

MR. BRODY: Yes, Your Honor.

THE COURT: Mr. Brody.

MR. BRODY: Thank you, Your Honor. Again, for the record, Josh Brody from Kramer Levin on behalf of the debtor.

Your Honor, I think that when you sort of take a step back and think about all the evidence that's been presented today, you hear a pretty compelling story about how much work and how long a process the debtor ran in order to get where we are with the current deal we have signed up

with the stalking horse.

And I think I was going to try to weave through some of the evidence without repeating it all obviously. But I think and I'll obviously get to the Committee's specific objections in a second, but I think that it's important again -- and sometimes you can get lost when you're looking at the details to take a step back and think about a few important points overall with respect to the relief that's being sought today.

First, at the risk of overstating the obvious, the debtor did not arrive at a decision to sign up this deal quickly. This is the result of a four year marketing process. I mean, it's the kind of thing I feel like you almost can't say it enough. Four years, the debtor has been marketing itself and the bank for a variety of types of transactions. There have been multiple fits and starts, but this, out of 130 parties that have been contacted over the years, there's one deal that ever got to signing -- one. I think again, it cannot be overstated.

And second of all, layered on top of that is that the debtor has been in severe financial distress for quite some time. And it doesn't just necessarily start and end with the C & D and the various regulatory orders that were issued four years ago. While there was some element of time, as I think the evidence made pretty clear and is

undisputed that the debtor had started doing better or the bank had started doing better, that trend is turned the opposite way.

And so you have $60 million in (indiscernible) coming due in January. You have the regulators continuing to push the bank to correct the financial condition over again the four years. So it became clear -- it sort of again, stating the obvious, that the debtor needed to do something. And this deal was, again, and I apologize for beating a dead horse. It was the only deal available, period.

I guess the other preliminary point I would make is again I think this is something that everyone acknowledges, the filing of the bankruptcy didn't stop the clock on the issues that impact he bank, be it regulatory, be it the value of the bank's assets or any other issues they could -- it could impact value. Filing of the bankruptcy had no impact on that and that will continue.

There's of course the interesting thing I think about the Committee's objection is I think they realize this -- I think in fact, some of the comments that Mr. Wu made, they recognize that right now this is the only deal the Debtor has. It's the only deal that's available.

And so I think in some of the positions that they take that indicate the willingness essentially to blow up

the deal and have the stalking horse walk away, I think that even the Committee in their heart of hearts recognizes they don't want that.

And so, yes, they're pushing on a lot of the points that they'd prefer that they were better. Your Honor, from the debtor's perspective and I think as the redline that we filed to the bid procedures makes clear, we would like nothing more than a better deal. But this is what we have, this is all we have. I think it's very important to keep that in context when we look at the specific provisions that they're objecting to.

You know, interestingly, Your Honor, I think in some respects this sort of carefulness with which the Committee is putting forth their objection is actually pretty clear, because some of the positions that they take, I think are actually -- if you really look closely -- not so consistent. For example, the Committee is very concerned the bid deadline is too soon. Okay. But on the other hand, they recognize and their concern is only a downward purchase price adjustment.

And their worried that tier 1 capital at closing is going to go down, but extending that deadline -- if you extend the bid deadline, that's only going to exacerbate the problem of the tier 1 capital going down. And the same thing is true of the closing date, which I will get to in a

little more detail, Your Honor.

I think the same thing is true, Your Honor, with respect to the Committee's objection to the stalking horse bidder fee. On the one hand they're saying, Your Honor, don't look at what's going into the bank. Only look at what's coming into the debtor and that's the number you should use. But at the same time -- and this is true in both the objections they filed and some of the questions that were asked today. They want to say that the $750,000 portion of the breakup fee attributable to the bank, well that impacts the debtor too, so that part ultimately really does matter even though it's coming out of the bank.

You can't have it both ways. And I think that, Your Honor, part of the thing I think the Committee struggled with a little bit is again, they know that if we lose this stalking horse bidder, it would be extremely disastrous for the debtor.

I guess with that back drop in mind, Your Honor, I'm going to turn to the specifics of the Committee's objections. And again, I think that for both brevity and ease of -- because there are a lot of smaller issues out there that I want to address, really the three issues that Mr. Seligman mentioned at the outset of the hearing, which were specifically the timeline, which is the bid deadline, the closing dates, economic issues, breakup fee expense

reimbursement and then the (indiscernible) amount requirement.

Obviously to the extent Your Honor has other questions about other provisions, I'm obviously more than happy to discuss them. So it looks like a --

THE COURT: Let me ask you this question. Mr. Brown I think in his cross-examination -- I puzzled over this when it was happening -- seemed to suggest that there was the prospect of additional concessions on these three points from the stalking horse purchaser. Are any changes in these terms that are in dispute between the Committee and the debtor actually in the offering before I make a ruling here?

MR. BRODY: So I think I would say the following. I think that with respect to the issue regarding the recap amount, that the language that we changed I think largely addresses the Committee's issue. Mr. Seligman may disagree, but I think on that point, that's where we are.

With respect to the other two issues with the extension of time and the breakup fee and expense reimbursement, to be honest, Your Honor, on those two points there's been very, very little discussion. And, you know, I can speculate as to why that's the case, but notwithstanding there were a lot of discussions amongst the parties. Those two issues it was very, very -- I don't think any real

movement on it at all. So I would not expect that there -- peace is going to suddenly break out before Your Honor rules.

THE COURT: All right. Thank you.

MR. BRODY: So, I guess, Your Honor, again, I don't want to go through all the specifics of Mr. Boyan's testimony, because I think that Your Honor it's kind of puzzling to me. I have never seen a debtor that was marketed for so long prior to the petition date -- four years, 135 or so parties by the acknowledged experts in the space, in the industry when it comes to banks and bank holding companies. They called everyone they know. They've been out there beating down doors. Mr. Boyan testified, you know, when you call somebody five times and they keep saying no, at a certain point you have to stop calling.

And Mr. Boyan made clear, you know, when you think about it, for all the Committee's blustering about their objection that they didn't like the process, really it comes down to one thing and Mr. Wu said this. It wasn't the last four years. They recognize, you know, that was okay. It was the last four months prior to petition date where they say, you know, you should have been out there specifically marketing with all the bells and whistles, this 363 deal.

And I think, Your Honor, first of all, I think

it's clear that Sandler O'Neill did try to make contact with other potential bidders they had spoken to, to discuss interest in the 363 deal, not to mention the fact that again over the course of the entirety of the four years, they were talking to people about any transaction. Tell us what you want to do, tell us what you're interested in and we are more than happy to consider it and see if we can't get it done.

At times was their focus on other transactions? Yes, because the debtor -- and frankly this just makes sense and I think the Committee would be upset if we had -- the TruPS holders would be upset if we hadn't tried at various points to focus on transactions that would maximize return to the TruPS holders more so than a 363 sale.

And, you know, again, Your Honor, without running through all the specifics of Mr. Boyan's testimony, because I think the over --

THE COURT: I don't think that's necessary. Let me ask you this question. This is a question that -- and certainly I'll let Mr. Seligman address it also. But I look at the bidding procedures that were proposed, the ones that are -- I keep looking at the redline copy that's on file at 118. I realize that's a slightly different document from what you had in the exhibit book, but it's the same document in substance.

As I understand the Committee's objection, it's that -- on this point -- it's that somehow the April 30 deadline is an arbitrary impediment to the ability of a competing bidder to make a qualifying competing bid because it will take them longer to get regulatory approval and nobody can start from standing start today and get to April 30th and close the deal.

So I'd like you to address that, but specifically in the context of the bidding procedures, I don't read April 30th as a hard deadline. It seems to me, as I read it, that the professionals that represent the debtor; the debtor in the exercise of its debtor in possession fiduciary duties is free to engage in discussions with third parties and might be topping bidders. And if those parties come to you and say, hey we're a mega bank, we have tons of capital, we're willing to overbid this by $50 million, but we need a 45 day extension, isn't the debtor free to, at that point, assuming that they're exercising business judgment consistent with their fiduciary duty, say, that is a qualifying bid, it tops the stalking horse and let it go to auction?

MR. BRODY: That's absolutely correct, Your Honor. That is exactly why I think we were sitting here listening to some of the questions kind of puzzling over the same thing.

The April 30th deadline was a deadline that the

stalking horse wanted from their own perspective because they want to close as quickly as possible. So the idea that we're going to use the stalking horse's construct but give us that exact flexibility that if -- to use Your Honor's example, if Mega Bank comes in and wants to bid even something slightly higher, but they say, but we think we're going to need a little more time to close and get regulatory approval, absolutely.

I mean, I think one thing that's important that goes directly to this point but it's also a more overarching point as well, is the regulatory overlay here is what it is. And obviously from the debtor's perspective, in any auction, a debtor has to look at closing risks, whether it's regulatory or otherwise. Here, because of the regulatory overlay there is that specific risk that is one that we have to deal with. So, the idea that the April 30th date is there, I think as Your Honor said, and I think frankly the language is as clear as could be.

And to Your Honor's point, this is a provision that's in the qualified bid requirements. So if somebody comes in and says well I see your April 30th date, but I'd like you guys to agree that my bid can be later, so we can do that. I think Your Honor is absolutely correct as to how this provision actually works.

THE COURT: Is the competing bidder required to

include this downward adjustment in the purchase price in their -- they're free to offer whatever they offer?

MR. BRODY: That's exactly -- I'm glad Your Honor asked that question, because it goes exactly to the point -- at one point Mr. Brown was asking questions of -- frankly at this point I forget which witness. I think it was Mr. Keidel asking him specifically about, you know, can other -- what will happen if another bank is worried about capital going down. That's a purchase price issue. And that's a question of, is the -- if the bidder wants to come in and say, I'll do 4.775, with no downward purchase price adjustments. So we'll have to figure out at that point what do we think the downward purchase price adjustments are going to be and figure out how much more, if anything, that that bid is.

So that really is what I can call a stale issue. And that's part of what the auction -- frankly, given the downward purchase price adjustment; we've made it a little bit easier for a bidder to come in. All they have to do is strike that provision and suddenly they've given a better bid than the current bid that's on the table.

So, Your Honor, is absolutely correct, I think from our perspective, where that impacts the dates is right now. This is the deal that we have and we're afraid that if you start pushing out the dates of the bid deadline that

even if the stalking horse agrees to stick around, which frankly, Your Honor, I don't know that they would. I think in any club deal or group deal like this, you have to worry. All it takes is one person to walk and things can unravel very quickly. But that aside, if you push the dates out, it ultimately may mean that you have less consideration coming into the debtor.

THE COURT: I don't want to cut you short, but I think it's time for me to hear from the Committee as to why these concerns that they have remaining are a reason why the Court should either not approve these bidding procedures or do something other than what you're asking, which is for the Court to approve the bidding procedures as proposed in document number 118.

MR. BRODY: Always happy to be cut off by Your Honor.

THE COURT: Mr. Seligman.

MR. SELIGMAN: Good afternoon, Your Honor. Your Honor, I would -- there's one thing that -- I agree with Mr. Brody on a lot of different things and various matters. One thing I --

THE COURT: Let me ask you before you start, your co-counsel I thought was implying in his examination of the witnesses that there was forthcoming some concession on some of these points by the stalking horse bidder that perhaps

the Committee has in its pocket. Is that true?

MR. SELIGMAN: No. I think the point of --

THE COURT: But if it's not true, I mean you could ask questions all afternoon. Well, of course the debtor would accept $100 million more than what's being proposed.

MR. SELIGMAN: I think that was simply the point, Your Honor, of a lot of these bidding procedures were impositions from the stalking horse as opposed to necessarily things the debtor was saying was important from their perspective to maximize value. I think that was the point of those questions. So, maybe I --

THE COURT: So you don't have any rabbits to pull out of your hat on new terms of conditions?

MR. SELIGMAN: I have no --

THE COURT: Okay.

MR. SELIGMAN: I have no rabbits, h.

THE COURT: All right.

MR. SELIGMAN: Your Honor, stepping back just big picture, I just want to remind Your Honor that the Creditors' Committee consists of three members who are TruPS holders. These are instruments that are held in these complex CDOs. They are fairly passive investments. This is not a -- these are instruments that maybe you heard, they're held by some of the board members. Some people, you know, individuals, moms and pops in the mid-Atlantic region,

insurance companies, other bank and financial institutions, these are not hedge funds who are coming in and buying these things at 3 cents on the dollar and now trying to hold things up. I mention that --

THE COURT: Why does that matter?

MR. SELIGMAN: Your Honor, I just want to mention that because I --

THE COURT: I mean, wouldn't it --

MR. SELIGMAN: -- think there's been some assertions here that we're trying to blow up deals and the like. And I just want to start off by saying, Your Honor, that step --

THE COURT: I don't think that your client, the Creditors' Committee is here trying to blow up a deal in violation of its fiduciary duty, so move on to your next point.

MR. SELIGMAN: That's fine, Your Honor. I did want to mention, Your Honor, we talked a lot about these different -- these bank holding company cases and there's been a number of them over the past several years. And they all are fairly -- they follow pretty much the same play book in the sense that they're usually filings with a stalking horse lined up. There is a request for a very short period of time for a bid procedures order for an auction and the like.

Those are -- and there's the same assertions by the company that there's risk here, regulatory action, that the bank may be a melting ice cube and the like. These are typical things that are asked for and routinely in these cases and again we represented Creditors' Committees in two of these other ones. Routinely, the job of the Creditors' Committee is to come out and point out issues, Your Honor, that we think don't maximize value or the chill bidding, because again, the whole process is about maximizing value here.

And invariably in all those cases and there's various provision throughout, but invariably, all those cases, the Court's accept some provisions but they push back on others. Routinely in all these cases, the debtor will come in and say, Judge, it's the only thing I had and I asked the stalking horse to change things and they said no. And in all those cases, it's ultimately up to the Creditors' Committee to try and be that stalwart to push back that momentum and say here's what we think is in terms of what's fair.

And it's ultimately the judge sometimes who says, you know, hey stalking horse, are you going to tell me if you're going to walk tomorrow, because I think that maybe another week is appropriate or I believe that the breakup fee should be reduced or the expense reimbursement should be

reduced.

So I understand the debtors did the best they could in terms of negotiating these bid procedures. I understand that they felt that their hands were tied because that's all they had. But part of this process is not to just accept that as given and to say the buyer is going to walk, but it's to do what we think maximizes value and more importantly, Your Honor, to paraphrase Leonard Hand (ph), it's not just about doing what's right, but it's about the appearance of what's doing right.

Your Honor this morning had concerns about sealing the courtroom because bankruptcy is a transparent process. Bankruptcy is an open process. If people want to come into the bankruptcy courts and implement a transaction, there is a cost to it. There's life in the fish bowl. You've got to be open. You've got to be fair. You have to have the appearance of being fair.

And if it turns out here, Your Honor, that at the end of the day there are no other bidders, we all have to feel comfortable that the reason that there was no other bidders because the market spoke as opposed to these bidding procedures being chilling or prohibiting other people or creating such an unlevel playing field that a lot of people said, you know what I'm not even going to bother to make a bid because it looks so stacked against me. It's just not

worth my time, there are other opportunities out there.

I believe the process is important and that's the role that we've played. I think we've been constructive and trying to resolve our concerns with the DIP. Again, we were not focused on other issues about the DIP. We focused on making sure that it did not implement or impact the bidding procedure process.

We could have stood up here, Your Honor, and talked about, hey this is a sub rosa plan, it should go through voting. We could have raised all those types of issues, but we focused on -- we said, yes, okay. Let's have a sale. We understand that, but let's have a process that is appropriate.

We owned the legal standards here with respect to what governs the various bidding procedure. It obviously has to not be collusion. It has to encourage bidding and not discourage bidding. So I won't spend any time with respect to that.

But I will make a point, Your Honor, that when you have a -- when a debtor comes in on the first day with a stalking horse bid in hand and comes in with a very short time period -- and I don't think anybody will doubt that this is a short, you know, 30 days is a short time period. It's not three months. But the point is, is that does the debtor come with a stalking horse that they can really say

that they looked at and they got the best stalking horse there and that that stalking horse was the product of negotiation or in the formal bidding or whatever it may be, that's important. And when you have such a short process, it is appropriate to look at the pre-petition process and to say what was done there. But there is a balance.

If somebody had said, you know, we had five or six people that we all said to them, hey look we're going to file for bankruptcy in two months, we need a stalking horse, here are the terms, here is our indication of value, this is the kind of stalking horse bidding procedure we can provide for you. That's what I see is fairly typical. When you do that and then you say, okay, now I can have a shorter or a more -- a shorter, you know, second round -- sometimes that makes sense.

But when you're coming in with a stalking horse that wasn't the product of a 363 shop, it puts more pressure and more tension on the round two. Especially here, Your Honor, where there has been a no shop provision since the filing date until a couple of days ago.

And I think that's important. Some of the other cases I've been involved in, the day after the filing, the debtor's financial advisor is going out with more marketing materials and saying, okay here we are, here's my teaser. But that's not what happened here.

As a matter of fact, Your Honor, the bidder that's in there right now conducting diligence, they were initially rebuffed. They called up the debtor and they said, we'd like to get in the data room. The debtor said no. The only reason they're in the data room was because they called one of the members of my committee who called me and I called debtor's counsel. And I said, I got somebody who was told that they can't participate in the data room, they can't get in there. What's going on? And then the person was allowed to be in the data room.

Part of our comments to the bid procedures as contained as an exhibit to our objection said that the debtor should have an affirmative obligation to proactively market. They didn't do that and it's only about two days ago where they decided, now, we're going to proactively market conveniently right before this was filed.

So let me now turn with that background, Your Honor, to the issues. One timeline we believe it's too short. Again, because of the tension on the fact that -- the tension and focus you have to put on this round two because of what we believe was the inadequacy of the round one process. Obviously they've been looking for four years. There's no -- we're not taking --

THE COURT: Why is there any reason to think that anybody who is interested in this bank doesn't already know

about it? I mean it's been shopped for four years. They made a public announcement. The deal with the stalking horse has been a matter of public record since the day it was filed in this Court. Well, yes it is what it is. They did the best that they can. They're opening things up now. We're about to run through a bidding procedure. I mean, what more were they supposed to do?

MR. SELIGMAN: What more were they supposed to do, is they weren't supposed to then say as a result of that process that they're going to put these kind of bid -- these kind of break out fees and expense reimbursement in there.

We've talked about it's just a short period of time, Your Honor, for somebody to get in there. And, you know, again it is true that they have been out there but they've never been out there with a 363 shop process where they've been saying here's what you can do. We're now talking about this level of indication of value. We're now talking about a transaction where you can take this thing free and clear of the debt, free and clear of the equity. It's a different type of transaction.

THE COURT: So let's focus on the specifics. What's wrong with the timeline? Why doesn't the flexibility that's built in here on the April 30 closing deadline as discussed with counsel, why doesn't it address the concern expressed by your own witness?

MR. SELIGMAN: I think, h, with respect to that, I think that I would make it simply say -- instead of putting a date out there and having people think about oh well if there's a sale hearing in mid-April I only have two weeks to get regulatory approval. Why not just take out that provision?

Why not say that a bid -- any bid should list a proposed closing deadline. The debtors are free when they are considering the highest and best offer, they are free to consider the closing deadline that's proposed by the buyer, the bidder as a relative date. If somebody proposes April 17th, well then I would say -- they would probably say that that's great. If somebody proposed December 31st, well then they would say that's too long. But I think this sends a signal that that's the kind of deadline and is somebody going to then do a bunch of work when they know that they're going to have to then see if the debtors is going to waive it or not waive it? There's no need for it.

Just say part -- one of the things that you have to include in a bid is your proposed bid deadline. And let the debtor then decide what -- in terms of regulatory approval and everything else, let them consider that as part of the mix. I think that would be appropriate and that would resolve the issue with respect to that closing deadline from the Committee's perspective.

Let me address if I can -- I want to come back to the timing in a second, but want to move to the breakup fee and the expense reimbursement and any other stalking horse provisions.

Your Honor, at least in my experience, the rule of thumb always for me was 1 to 3, 1 to 4 percent for breakup fees and then some reasonable amount of expense reimbursement. I just feel, Your Honor, and I think that whether you look at large 363 cases in general in Chapter 11 or whether you look specifically at the bank holding company cases. $2.75 million off of a $4.75 million transaction, that's just way off market. I mean, as we've said, it's approximately 22 percent --

THE COURT: But that's not the deal.

MR. SELIGMAN: That is the deal.

THE COURT: But the purchaser of this asset, of this estate, has to capitalize the bank one way or the other.

MR. SELIGMAN: Your Honor, I think that argument, number one it's been -- I don't think it's logical, number one. And I think it's been rejected by multiple cases.

I think the point of this debtor and this estate is what value comes into this estate.

THE COURT: So we restructure the transaction so that the stalking horse purchaser pays an additional $80

million to the estate so that it can capitalize the bank before the -- and that solves your problem? Isn't that the substance of what's happening here? Why would that make it any different in substance?

MR. SELIGMAN: Because the $80 million is not being distributed to creditors. Your Honor, if that's --

THE COURT: If there is no $80 million, there's not going to be 4.775 or whatever the number is.

MR. SELIGMAN: I understand. But the question is, Your Honor, is this is the debtor locking up a payment to a stalking horse in case there's an over bidder. It's also additional amount that has to be bid by any competing over bidder of multiple millions of dollars. And the question is what are they, you know, what are they getting for that. And what they're getting for that is 4.75. They're not getting the 85 to 100 million. It just doesn't matter.

Your Honor, I would say to you if you look at it from the buyer's perspective, I think that has dangerous precedent and that's going to get a slippery slope. Because in the next case, a buyer is going to say, well I know I'm going to buy this asset, but you know what I'm going to spend a bunch of money incorporating it. I may run a new marketing campaign. There's a lot of fixed and some costs that a buyer has to put into a transaction.

And by the way, Your Honor, the capital that

they're putting in, it's not for our -- it's for their benefit. It's you know the $80 to $100 million, whatever the number is once they buy the bank it's their capital. It's on their balance sheet. It's just basically what they're saying is, I'm going to write a check, I'm going to give -- I'm going to have money in one hand and I'm just going to put it in this other pocket, but it's on their balance sheet. It makes no difference to us.

I suppose, Your Honor, that if somebody -- to give a hypothetical if somebody came in and said I'm going to pay $10 million because I want the trade name of Fmar (ph) and I don't really need the bank. Why wouldn't we take that too? That's the relevant amount -- I would say in that instance, they're paying $10 million. That's the benefit to the estate. It's not the $85 million and we have cited in our brief, we've cited multiple cases that have rejected that argument. The big Sandy case.

I've got to tell Your Honor another example in the first place a bank holding company case last year in front of Judge Shannon. In that case, the buyer had very what I would consider onerous bidding procedures there too. The buyer actually upped their bid before the bid procedures and agreed to pay the creditors in full. And when the buyer is paying you in full, the Creditors' Committee, who are we to complain, right? The buyer also made the same argument that

they were seeking -- I think it was $5 million off of a $45 million transaction. So roughly, 10, 11, 12 percent and they made the same argument to Judge Shannon.

And Judge Shannon turned to them and said, no I'm only going to approve this amount. I'm only going to approve, because I think the range is 1 to 3 percent, 1 to 4 percent and that -- and the breakup fee was cut by 40 percent. Because Judge Shannon, said you tell me what you want to do, but that's the level in which I feel comfortable.

So I just believe that valuing it based upon what the buyer is putting in doesn't make a different because in every situation --

THE COURT: Why does it matter what I feel comfortable with? That's not really the standard here, right? It's not how I would run this case if I was the counsel for the Chapter 11 debtor or you and I were doing it together. Isn't the standard whether the debtor exercising its fiduciary duties has properly exercised business judgment to devise a process and do what it's done to get us where we are today?

MR. SELIGMAN: You're absolutely right Your Honor that the test for bidding procedures is 363, it's debtor's business judgment. But I would submit to Your Honor that there is a market for the appropriate bidding for breakup

fees. It's a market that's developed. It's what people expect and again 1 to 3 percent, 2 to 4 percent is the range in which people are doing it. And let's call a spade a spade when we're talking about the 2.75 against 4.75. It's a 60 percent breakup fee based upon the value that's coming to the estate. And the question is, is based on those economics, is that going to enhance bidding or is that going to chill bidding?

Certainly stalking horses who come to the table deserve to get some amount of a breakup fee for the fact that they're coming to the table. There's no question and we're not quibbling with that concept. But the question is, should that level of breakup fee be appropriate and that I would submit, Your Honor, is out of whack with all other Chapter 11 cases and even all of these other bank holding cases. I just happen to have a note here that the ones of most recent vintage, Texas Bank shares, 3.4 percent of the cash, Mercantile, 3 percent, Rogers 4 percent.

THE COURT: Was there capitalization requirements in those cases?

MR. SELIGMAN: In Mercantile the -- it wasn't part of the bidding procedures, but yes the buyer was putting in capital. But it wasn't -- nobody even thought to add that to the deal and try and justify the breakup fee. They chose a 3 percent based on cash post-closing, yes, they were going

to have to work out with the regulators, working out putting in some additional capital. But that was on them to do. It had nothing to do with the estate and that's the way it should be.

In the First Place case, yes, they were putting in significant additional capital. And again, in the First Place, they argued to Judge Shannon, that's the denominator that you should use.

And Judge Shannon said, I feel very uncomfortable approving that bidding procedure because it should be based upon the cash and it's way out of whack. And Judge Shannon said I'm not going to -- you go in the hallway and you tell me what you want to do. And so 3 seconds later, the stalking horse came back and said we're going to cut our breakup fee by 40 percent. And the judge says, thank you very much, with that I'll approve it.

So in both Judge Shannon in the First Place case and Judge Kerry (ph) in the Mercantile case, they both did not -- neither -- they recognized in the colloquy they said, I know what goes on. The buyer of course is going to impose very tough, onerous bidding procedures. And who can blame them?

The buyer is going to ask for what they're going to ask for because they don't want competition. I don't blame them for that. And the debtor may be in the middle and

trying to do the best that they can. But both Judge Kerry and Judge Shannon said, I'm not going to be bullied by the fact that somebody is going to walk. You tell me if you're going to walk if I'm going to change these procedures and I'll know. But the Courts said, let's do what's appropriate.

We can't complete defer to the business judgment on this one. It's a matter of what's appropriate for fostering competitive bidding and people push back, court's push back. Creditors' Committees push back to get what's appropriate because again it's not just what's right, but it's also the appearance of what's right. So that we know if we go through this process, we will feel comfortable that the Chapter 11 supervised process was done fairly and if there are no other bidders is because the market spoke as opposed to any hooks.

I did also though want to point to another element that makes the breakup fee an expense reimbursement even more egregious. And that's because this is not for a locked in deal. Even if Your Honor were to say, yeah I know these things are high, but there's a locked in deal. This is not a locked in deal.

What do I mean by that? Well, firs, there's the tier one capital downward purchase price. As we noted, ironically the capital goes up, it's not a benefit to the

estate. It's only a one way ratcheting down. If the bank -- if the capital goes down a couple of million dollars and especially if the regulators take a couple of months before this thing closes, if that's the scenario, we could end up and Mr. Keidel acknowledge it. It's a possibility that you could end up that the purchase price in this case is zero.

So why should we put that level of breakup fee expense reimbursement for this size deal, 2.75 off of a $4.75 million deal when we don't -- that 4.75 that's not even locked in. And I would submit, Your Honor --

THE COURT: But the breakup fee only comes into play if you have a higher offer and presumably that offer is going to be locked in if we have one. We don't know what that's going to be.

MR. SELIGMAN: Right, but that's --

THE COURT: You haven't lost anything.

MR. SELIGMAN: What you have --

THE COURT: You're ahead of the game if you're paying a breakup fee.

MR. SELIGMAN: No, you have lost because what you're doing, Your Honor, is you're paying what we believe is a disproportionate over market amount to lock in a deal that's not really locked in. There's a price at which you pay to lock something in. And to know that worst case, no bids I get 4.75, but we don't know that.

And so to the extent that there are other bidders out there who would say, you know what if it was $250,000 breakup fee I may participate, but a million, maybe I'm not. There's always a balance.

There's always a balance on the breakup fee. Are you sitting at -- you want to set it low because you want to encourage bidding, but at the same time you gotta get the fish you have and that's okay. But at some point, Your Honor, you set the thing so high that some people don't come to table. And you know what, if you have a rock solid deal, maybe in some situations, a higher breakup fee is appropriate, but not here where it's not locked in, number one and number two, if for whatever reason there's no regulatory approval by April 30th, the stalking horse can also walk from this deal.

So again, we're talking about a mid-April sale hearing. If the regulators come back and say, you know, I need more information on this guy. I need to run another background search and it takes a little bit of time. It's a couple of weeks or whatever. People are still waiting for the regulators to make a decision.

THE COURT: Isn't that factor to consider at the sale hearing?

MR. SELIGMAN: I would say no, Your Honor. Because again, it's the price you're paying now to lock up

somebody. Again, there's a price to pay to lock somebody up. But you better lock them up and you know if there's no other bidder, you got something solid on the hook. And here, there's nothing solid on the hook because of those two issues. And we've asked. And the answer has been no that we're not going to give you on those points.

THE COURT: I was asking a different question.

MR. SELIGMAN: I'm sorry.

THE COURT: As we get to the sale hearing and there hasn't been any overbidding and we don't know what the regulatory approval is going to be and we have this ratcheting down of the purchase price. Isn't that the time for this objection to be made?

MR. SELIGMAN: I don't think so, Your Honor, because we're only going to run an auction once. You're right that that is an additional consideration and maybe if that was the case, maybe I'd say, Your Honor, at this point they should lock it in if they really want to (indiscernible - 00:39:21), but at that point, the water is over the dam because we only have one chance to run this auction process and we better do it right.

And if we're going to -- you can bet, if it's true, as Mr. Boyan said, that he's tired of people -- people are tired of him calling five times. If we do it one more time, we're never going to get another chance. And so

that's my point, Your Honor, is we're paying too much for a deal that's not -- that's a femoral and that's going to potentially cause other people not to bid and, you know, there's leverage you pull with trying to find the right way. What's the balance between encouraging people and discouraging people. But I just think without knowing these -- without having the buyer locked in, what are we paying for? What are we paying for?

I also want to mention to Your Honor the point about -- which I think came out when Mr. Brody was speaking, this issue also about the size. I don't know that it merits much discussion but again, to the extent that the debtors are arguing well, the breakup fee is only 250 because that's all the debtor is paying. That's not the case.

If you ask anybody, Your Honor, because the 750 from the bank matters. This is not a -- the bank is not a operating business where you value it based upon an EBITDA multiple of earnings where the cash on hand doesn't change the value. No, this is a bank that is based upon the capital.

If you ask anybody and it makes sense, if you ask anybody, if the bank, you know, puts $750,000 and bet on the lottery and lost it, would somebody pay $750,000 less for the stock of the bank; of course, because they had 750 less of capital. So it's money that directly impacts the value

of the stock.

The final point, Your Honor, that I want to focus on is the recapitalization requirement. And we've done a lot of talking about this and frankly, Your Honor, I don't understand what the problem is from the stalking horse is or from the debtor's perspective on this point.

We have suggested multiple times, it is totally appropriate for the debtor in considering who is the highest and best bid and as Your Honor know, it's not the highest bit, it's the highest or best. It is completely appropriate for the debtor to consider the likelihood of regulatory approval. And it is completely approach for them to consider how is the buyer structuring the transaction? Are they writing a check? Are they allocating capital? How much are they allocating? And that's totally appropriate and they should consider that.

But the fact is we have some arbitrary requirements that we heard testimony from the debtor's advisors that it was not set by them. It was basically dictating by a stalking horse that the amount should be 85 to 100. Where did they get that? Well, they sort of backed into 75 and they added some cushion, right? Why do we need that? From our perspective, that is just going to another -- amongst all the little hooks here, that's going to cause potentially somebody not to bid.

If they -- because I can tell you this, Your Honor. If Warren Buffet comes forward and says, I'll pay $50 million for this bank and I'm going to contribute capital up. I actually -- he says I've spoken to the regulators and actually I think $80 million is the right number of capital and that's what I'm going to do, the debtor should be able to consider that. They shouldn't knock out Warren Buffet at the bid stage and say it's not going to --

THE COURT: What allows them to do that under these bidding procedures?

MR. SELIGMAN: Because the bidding procedure says that a bid has to have a capitalization requirement equal to the equity capitalization amount, which is defined as 85 to `100. We have suggested language on multiple occasions that simply says that the -- in order to be considered, a bid should get to --

THE COURT: I'm looking at the document at 118 at paragraph 9(a)(4) at the sentence, which was added, which says in addition, such bid must result in recapitalization of the bank of at least the recapitalization amount unless the debtor determines after consultation with the Committee that due to proposed transaction, the bank would be nevertheless be capitalized to the same extent as the equity contribution, meet regulatory requirements and otherwise

receive regulatory approval of a proposed transaction. Why doesn't that address completely what you just said?

MR. SELIGMAN: Because -- and we talked about this. We told him because what it says is that unless the debtor determines that to a proposed transaction, the bank would nevertheless be capitalized to the same extent as the equity contribution. Equity contribution is $85 million. And our point is if somebody comes forward and they can say, you know what, we think that through our structure, that we're going to capitalize this thing is supported the $80 million, $79 million. I don't know what the right number is. They should be free to consider that. They can talk to their regulatory counsel. They can talk to Samuel O'Neil. They can talk to the regulators and say, is that appropriate.

But to just arbitrarily say that it has to hit 85 because of a number imposed by the stalking horse, we believe is inappropriate. They should be free to factor that in and we just believe that this is another example of the stalking horse trying to tweak the procedures in a way that's going to cause people to say, you know what this thing is stacked. I'm not going to even bother.

So that is how we would suggest that that would be fixed. I think it's a relatively simple fix and it shouldn't affect anything.

If Your Honor would just give me 30 seconds to make sure that I've addressed all my points --

THE COURT: Sure.

MR. SELIGMAN: -- and I appreciate that indulgence.

(Pause)

MR. SELIGMAN: Your Honor, so one more point. It's the point about -- and this goes back to the question of timing. And let me start with that we've heard references or assertions in various pleadings or in testimony to the fact that this thing has to happen immediately because maybe there is an inspector of regulatory action or maybe there will be customer deposit, withdrawals or the like.

I'd just like to put that issue, because that is something that is raised in every one of these cases and in every one of these cases, the debtor gets on the stand -- the debtor -- the CEO gets on the stand and says, I have weekly calls with the regulators. And as Judge Kerry and Judge said in the Mercantile case, I'm not convinced that there's imminent regulatory action.

There is a process by which a regulator before they're going to seize a bank, there's a long -- there's like a long ten step -- I always want to say twelve step -- ten steps that they have to go through before they can seize

the bank. None of those have happened. This bank has been under a cease and desist order for multiple years. We don't think there's any risk in whether it's 30 days or whether it's 60 days and I think Mr. Keidel testified to it, that's not going to make a difference from a regulatory perspective.

This -- with the bank holding company filing for bankruptcy, if there was any risk of a run on the bank, I think that would have happened and it clearly hasn't. Part of it -- and we've cited this in our brief, is there is such a high percentage left of deposits that are insured by the FDIC. So again, Your Honor, just to call Your Honor's concerns about that. Whether it is 30 days, whether it is 60 days, from that perspective, we don't think it's going to make a difference from a regulatory perspective.

THE COURT: All right. Thank you. Mr. Brody?

I'm concerned about this last point that was discussed. Does or does not this bidding procedure require a competing bidder to propose to capitalize the bank by at least this amount, which perhaps its arbitrary, perhaps it's arbitrarily high on the part of bidding -- I'm sorry, the stalking horse bidder. Does it really require what the Committee says?

MR. BRODY: I guess, Your Honor, I think to really put the right point on it, I have to sort of consider who

we're talking about as a potential bidder. In that --

THE COURT: I'd like you to answer my question first. If you want to argue why --

MR. BRODY: No, Your Honor. I don't mean to --

THE COURT: If you want to argue why there's some reason to do something different, fine, but does this or does this not require -- you're going to tell me there's a good reason for that, but what my question is, does it or does it not require it?

MR. BRODY: Fair enough, Your Honor. And I wasn't trying to be evasive. I just -- part of my understanding of how this is expected to work is in part based on who we expect to bid. But the answer to Your Honor is, if for example, a strategic bidder were to come in and buy the bank and absorb it, the idea that they would be capitalized at the same extent as the equity contribution is not -- they would not need to put up $85 million in cash. We'd need to know that they would be well capitalized once they've absorbed the bank onto their balance sheet. So it's really not quite the same thing.

THE COURT: So why isn't it sufficient to say that it's capitalized sufficient to get regulatory approval?

MR. BRODY: Well, Your Honor, I think the part of the reason for that is I'm not going to disagree with what Mr. Seligman said, but the part of this was the stalking

horse's requirement. But, I think even from our perspective we look at it as, you know, the bank -- the $75- or $85 million, that number we view as the number that anyone is going to have to hit.

So, if you don't have that requirement, the idea that we're going to start spending time with potential bidders who are going to come in and say, well, I just want to put $25 million into the bank and pay you $25 million for your stock when we know there's no way that gets regulatory approval, it just will not happen. So it made sense to actually set some guidelines.

The reality is, Your Honor, and I think this goes to some of the things that Mr. Boyan testified to, if you don't set sometime set some guidelines on bidders, they may take advantage. They say, yeah, you know, I'm going to play games a little bit and I'll put in a bid just to sort of keep you guys on the hook even though I'm not really serious about it. We want to make sure that any bidder that comes in is going to close. Because it's -- that point cannot be emphasized enough.

So the idea, we focused on that equity contribution, again is it possible somebody wants to pay less, I guess. But from the debtor's business judgment, without that equity contribution, you're not going to get anywhere.

THE COURT: All right. Thank you.

MR. SELIGMAN: Your Honor, I'm sorry, can I just respond to that. I think Your Honor the way you stated it and the way I understand is right. It is a minimum. If somebody wants to absorb, they still have to allocate the capital. If they want to take out as Your Honor said, it should be a bid sufficient to obtain regulatory -- and if they want to give guidance what they think is appropriate, that's --

THE COURT: I heard all the words and I agreed with you, I think that's what he's saying. He's saying there's good reason for it.

MR. SELIGMAN: And I guess my only point, Your Honor, is that we think that it's arbitrary and it doesn't need to be in there and they could equally give the guidance orally and say this is the kind of target we're talking about if you want to make a bid that we're going to consider.

THE COURT: All right. Thank you.

I've considered carefully the arguments that were made here in closing argument. I've considered the papers that were filed. I'm not considering any of the evidence or arguments that were made and redacted from the papers that were filed. And I've considered the testimony of the witnesses.

I find Mr. Boyan's testimony very credible and I give a lot of weight to it. I think Mr. Wu is a credible witness. I don't quell that he already has some experience, but based upon everything that's before me, I give little weight to his testimony.

I believe that the bidding procedures as modified at paper #118 and I have a few questions about the order that's been submitted. But subject to that, the bidding procedures as modified at Docket #118 should be approved.

As far as I'm concerned from all of this evidence, it's clear to me -- what's clear to me is as -- to use the words of Mr. Seligman, in my view, this evidence shows the market has spoken. And this is the best the debtor can do with the circumstances it faces. And if there's somebody out there who is prepared to act quickly under these circumstances and make a significantly higher bid, taking into account all of the factors and the reimbursement of the expenses and the bidding -- the breakup fee, then fine. If not, then we should move on because this is a situation that is challenging and difficult and the opportunity to sell the bank may be totally lost.

So I'm convinced from the evidence and I find that the debtor has exercised proper business judgment as a fiduciary and debtor in possession in this case taking into account all of the circumstances that are present about its

business and financial situation and that of the bank.

The bank has been marketed for more than three years. Exactly how long, I don't exactly recall, but it's been quite a while by an expert financial advisor who is experienced in bank transactions.

The timeline in my view is reasonable under the circumstances particularly considering the condition of the bank and the prior marketing that went on here.

I hear the Committee's concerns about the breakup fee, but under the circumstances, I believe the breakup fee is appropriate, because I think that as Mr. Boyan testified, the bank -- in a transaction like this, the debtor and the Court have to take into account the totality of the financial commitment being undertaken by the purchaser here. And when you compare this additional requirement to have the capital available to capitalize the bank, the purchaser is committing far more than just the actual cash consideration purchase price that's flowing into the estate. And under those circumstances, I believe that the breakup fee as proposed and the expense reimbursement as opposed are appropriate, reasonable and are not onerous under the circumstances of this case. I'm not saying I'm going to approve them in the next case, but I don't find them to be onerous in this case.

While I have some concern about the

recapitalization requirement that I expressed, I believe that my concerns are addressed by the evidence and the arguments being made by Mr. Brody. This is a situation that requires action and it requires it now. The market has spoken. And we don't need -- I think it was Mr. Wu himself who testified about the challenges of a debtor trying to run a due diligence and an auction process when it has to deal with too many prospective purchasers. We don't need mere meddlers here trying to make low ball offers and bog down the process if they aren't really serious and they aren't capable of getting regulatory approval. So I find that requirement under the circumstances of this case to be appropriate.

I think that the bid deadline and the closing date requirement of April 30th under the circumstances of this case are appropriate, particularly whereas here I read the bidding procedures to allow the debtor to solicit and receive offers that call for an outside closing date that's after April 30th. It's simply a factor that the debtor takes into account with his professionals after consulting with the Committee and its professionals as to whether a particular bill is higher and best.

So, my conclusion is after considering everything, I find that these bidding procedures should be approved and I will enter an order approving them.

Mr. Brody, I looked at the -- I don't know whether you're proposing a different order than the one that was filed with the original motion, but --

MR. BRODY: Well, Your Honor, I have to apologize. Under the mountains of paper at the moment, I can't seem to actually find a copy of the order, but I don't recall any changes being made to the order itself.

MR. SELIGMAN: Your Honor, I don't recall, but perhaps I'm sure between Mr. Brody and myself we can take a look at the order and just make sure the revisions to the auction procedure, to the extent there's some inconsistency, I'm sure we'll work that through and get Your Honor an appropriate order.

THE COURT: I'm sure you will. So let me get to my specific issues.

The order as proposed I think refers to the wrong exhibit to the motion with respect to the M&A agreement. Obviously it will need to be changed to reflect, because I'm ruling and I'm approving the bidding procedures at 118, not the ones that were attached to the motion.

Paragraph 5 -- and Mr. Brody, if you don't have your order at hand, I think I saw someone in the back waiving a copy that you might look at.

MR. BRODY: Your Honor, I guess it's good we didn't clear the courtroom.

THE COURT: Paragraph 5, which begins on page 6 and carries over on page 7 of what I'm looking at. The last sentence there contains a provision about the waiving of Rule 6004H and I'm fine with that under the circumstances. Nobody is objecting to that.

It also contains something I've never seen before and there are a lot of lawyers in the courtroom perhaps smarter than I am, but I've never seen reference to this Rule 62G. I had to go read it to see what it is. And I don't believe it applies unless -- because 7062 was not made applicable in a contested matter unless the Court otherwise orders it.

If this is intended to make clear that the Court is not otherwise ordering, fine, but the rule deals with what can be done on appeal. And I don't think this Court has the authority to tell the district court, the circuit court of appeals or the Supreme Court what jurisdiction they have under rule 62 or some other rule of procedure. So I'm concerned about what the meaning of that is intended to be.

I don't think I can order if Mr. Seligman appeals this, I don't think I can order the district court judge not to do something under this rule.

MR. BRODY: There's a first time for everything, Your Honor. Your Honor, and that's to the question, frankly standing here right now it doesn't much -- I'll discuss it

with Mr. Seligman and Mr. Wasserman.

THE COURT: Okay. Now, paragraph 8 is the only other provision in which I stumbled. Let me just say, as I understand what you contemplate, you want to have a hearing on April 10th if there is no auction. And --

MR. BRODY: I actually calculated as April 11th.

THE COURT: I'm sorry, April 11th and you want to have it on the following Monday if there is an auction, correct?

MR. BRODY: Correct.

THE COURT: So that's the 14th.

Just a minute.

(Pause)

THE COURT: All right. She's checking on that. My only other issue was with paragraph 8. What -- this order says that the bank is authorized and directed to pay its share of the stalking horse bidder fee. What jurisdiction, authority, power, does the bankruptcy court have to direct the bank to do anything? I don't know what contractual regulatory obligations the bank has that may permit or deny it the ability to do this. If it's a question of approving that the debtor cause the bank to do it, I'm fine with that, but do I have the authority to enter an order on potentially, I guess, the pain of contempt that the bank has to pay the $750,000 to the stalking horse?

MR. BRODY: Your Honor, this is a point that frankly was discussed early on in the process with the stalking horse counsel. I think the intent -- you're correct. The intent is that Your Honor would be authorizing the transaction that the debtor's perspective authorizing the -- or directing -- it's --

THE COURT: So the extent that some approval is needed from this Court --

MR. BRODY: Correct.

THE COURT: -- it's given, but I'm not directing on the pain of contempt that the bank must make the payment.

MR. BRODY: Correct, Your Honor. If Your Honor would like us to soften that language somewhat.

THE COURT: I don't think I have the authority to order the bank to do anything.

MR. BRODY: Okay.

THE COURT: So, yes I would like you to revise that to see if you can address that.

MR. BRODY: Okay.

THE COURT: All right. So based upon the note that I just received from the courtroom deputy, we can have a hearing on Friday, April 11th at 10:00 a.m. in the eventuality that there is no auction to consider approval of the sale motion, which at that point we would be -- I don't know what objections there would be, but we would be

considering just the stalking horse bidder's proposing as I understand what you're proposing. And at 10:00 on the 14th, if there has been an auction and there is to be a hearing after an auction.

So if you would adjust the time tables in here accordingly.

UNIDENTIFIED SPEAKER: Sure.

THE COURT: Anything else we need to do in the case today? I think someone wants your attention.

(Pause)

MR. BRODY: I guess Mr. Wasserman is raising the question about if Your Honor has a particular issue with the date we would pick for the auction. I think our intent, what the auction procedures provide for is that the auction would be held, not here. So I wasn't sure that Your Honor necessarily needed to be aware of that. I think as long as we're fit within the procedures, I wouldn't think Your Honor has any particularity about the specific date.

THE COURT: Well, have you picked a date? I mean, I would like to see consistent -- despite the fact I said what I said and I think the debtor has exercised its business judgment, I'm not going to second guess it at this point based on the evidence that I have. I don't want there to be some arbitrary shortening of this process. It needs to be as lengthy as it can possibly be to afford as much

possibility for a third parties to participate in the process.

MR. BRODY: Well, Your Honor, the way I think about it, once the bid deadline of April 6th has been set, which is what the procedures provide for, the days in between from bid deadline to sale hearing almost is really as much a function of making sure that the debtor can appropriately deal with bids that come in. So I wouldn't expect that the auction would be on April 7th, for example, the day after, because we need to evaluate bids that have come in. But it needs to give us --

THE COURT: I guess I was assuming it was going to be on the 11th.

MR. BRODY: No, I think the --

THE COURT: Because we don't need the hearing on the 11th if you're having the auction. It's going to be on the 14th. If there is no auction, then you can be here on the 11th.

MR. BRODY: No, I think that's right. I think the expectation was there was going to be some number of days between the bid deadline to the auction.

THE COURT: But that's Monday of this particular week, right?

MR. BRODY: Right, correct, Your Honor. I think I'm probably going to be -- I'm guessing the 9th or the 10th

would be the auction. I think. I don't know if Mr. Boyan's will --

THE COURT: This is an important date. I think it needs to be ironed out. I'm going to take a short recess while you figure out that.

THE CLERK: All rise. Court is in recess.

(Recessed and reconvened)

THE COURT: So do we have a date for the auction?

MR. BRODY: We do, Your Honor.

THE COURT: Excellent.

MR. BRODY: So just to be clear, to set the dates out. So the bid deadline, which in the redline that was filed said April 6th, which is a Sunday, so we're going to move that to April 7th. The auction will be April 10th. The sale hearing, again assuming there's no auction will be the 11th. If there is an auction, it will be the 14th.

THE COURT: Okay.

MR. BRODY: The objection deadline we had in here as March 28th. I told Mr. Seligman that obviously we were happy to work with the Committee if that date needs to be extended for them, we'll work that out.

THE COURT: I'm sure that whatever the two of you work out will be fine with us. If you make it too close to the hearing, then it may delay a ruling in the matter, but --

MR. BRODY: I will keep that in mind, Your Honor.

THE COURT: -- you guys are experienced. I'm sure you will come up with something that's reasonable under the circumstances. Anything else we need to do?

MR. BRODY: I don't believe so, Your Honor.

THE COURT: All right. Let me just say one last thing. I noticed that someone -- I don't know who it was -- in this case earlier at the last hearing, ordered a transcript. And I looked at the transcript and I was a little alarmed because one of the attorneys for the debtor was quoted by the Court reporter as saying that the indebtedness to the TruPS was $160 million, when I was sure I had heard 60. And of course that's consistent with the evidence that I heard today. We went back and listened to the tape and in fact, the attorney said 60, not 160. So whoever ordered that transcript, you need to talk with the transcriber, because we need to make sure we're using a transcription service that's getting the job done and getting it done right. And if somebody ordered that transcript, then I just wanted to point out that we were aware of that error and it's a material error in this case. All right. Thank you.

THE CLERK: All rise. This Court is adjourned.

(Proceedings concluded at 5:04 PM)

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I N D E X

W I T N E S S E S

I N D E X

E X H I B I T S

NO.	IDENTIFICATION	RECEIVED
Debtor's:		
1	Merger agreement	76
5	Auction procedures	80
4	Complaint	145
3	Resolution	156

I N D E X

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CERTIFICATION

I, Sheila G. Orms, Dawn South and Melissa Looney certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: March 11, 2014

Sheila Orms

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Signature of Approved Transcriber

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